IN THE

Supreme Court of the United States

WILLEY, Clerk

October Term 1955

No. 685

ALPHA BETA FOOD MARKETS, INC., a corporation, *et al.*,

Petitioners,

vs.

RETAIL CLERKS UNION LOCAL No. 770, an unincorporated voluntary association, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term 1955

No. .....

ALPHA BETA FOOD MARKETS, INC., a corporation; ALEXANDER'S MARKETS, a corporation; BETTER FOOD MARKETS, INCORPORATED, a corporation; THE BOYS MARKET, INC., a corporation; HARRY CAPLAN, INCORPORATED, a corporation; CARL'S RANCH MARKETS, INCORPORATED, a corporation; CRAWFORD STORES, INC., a corporation; FARMERS MARKETING COMPANY, INC., a corporation; FITZ-SIMMONS STORES, LTD., a corporation; GATEWAY FOOD STORES, INC., a corporation; GODFREY FOOD CO., INC., a corporation; HIRAM'S RANCH MARKETS, a corporation; JURGENSENS, a corporation; KING COLE MARKETS, INC., a corporation; LASAROW BROS. INC., a corporation; M M FOODS, INC., a corporation; MARKS FOOD CORPORATION, a corporation; McDANIELS MARKETS, a corporation; MARKET BASKET, a corporation; THE MODEL GROCERY CO., a corporation; PESSIN GROCERY COMPANY, a corporation; RAISIN MARKETS, INCORPORATED, a corporation; RALPHS GROCERY CO., a corporation; ROTHS MARKETS, INC., a corporation; SAFEWAY STORES, INCORPORATED, a corporation; STEWART BROS. MARKETS, INC., a corporation; VALLEY FOODS, INC., a corporation; VON'S GROCERY CO., a corporation; WESTERN INDUSTRIES CORPORATION, a corporation; FUTTERMAN AND GACH, a corporation, doing business under the fictitious firm name of SHOPPERS MARKETS; WEST SHORE COMPANY, a corporation, doing business under the fictitious firm name of ESKO, INC.; FOOD STORES, INC., a corporation, doing business under the fictitious firm name of HALES FOOD MARTS; HARRY CAPLAN, INC., a corporation, doing business under the fictitious firm name of CARL'S MKT. No. 6; HARRY CAPLAN, doing business under the fictitious firm name of CARL'S RANCH MARKETS; OWL DRUG CO., a corporation, doing business under the fictitious firm name of BIG OWL MARKET; AGNES M. CARTY and DONAL ARTHUR CARTY, copartners, doing business under the fictitious firm name of CARTY BROS.; MAX SCHWARTZ, ABE SCHWARTZ and BEN SCHWARTZ, copartners, doing business under the fictitious firm name of FOODS CO.; IRVING MOSS, PHILIP HARRIS and NATHAN B. MOSS, copartners, doing business under the fictitious firm name of HIRAM'S COUNTRY STORE; WALTER L. WEICK, doing business under the fictitious firm name of W. L. LAWRENCE PRODUCE; HAROLD F. ROBERTS, also known as H. F. ROBERTS, doing business under the fictitious firm name of ROBERTS MARKET; ALBERT KALIFF, DAVID STEIN and JEROME STEIN, copartners, doing business under the fictitious firm name of KINGS FOOD CENTER; PAUL KODIMER, doing business under the fictitious firm name of A B C MARKET; GEORGE B. KELLICK, doing business under the fictitious firm name of GEORGE'S MARKET; WILLIAM F. MATSUNO, doing business under the fictitious firm name of GOLDEN STATE PRODUCE CO.; LEO Z. JELIN, doing business under the fictitious firm name of CRACKER BARREL; LA BABE G. COREY, doing business under the fictitious firm name of MEADOW MARKET; DAN MONSON

and LARRY MONSON, copartners, doing business under the fictitious firm name of CIRCLE "M" MARKET; MAX GARTH, doing business under the fictitious firm name of BEST FOOD MARKET; HARRY GLICKMAN, MILTON GLICKMAN and PHIL GLICKMAN, copartners; SAM SERBER and YETTA SERBER, copartners; JOSEPH P. HUGHES and ELSA K. HUGHES, copartners; CLIFF HALL and VICTOR O. McGAUGHEY, copartners; GEORGE SELTZER and TONEY PERRICONE, copartners; M. B. ZISBIN; SAM NEWMAN; J. R. DAHL; ARSEN MELICKIAN; OSCAR O. JOHNSEN; VAUGHN BOWEN; and FOOD EMPLOYERS COUNCIL, INC., a non-profit corporation,

Petitioners,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an unincorporated voluntary association; and JOSEPH T. DeSILVA,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Supreme Court of the United States:

The above-named petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California rendered and entered December 16, 1955, and numbered therein as L. A. 23472, and in support of such petition, petitioners allege:

I.

Citations of Opinions of State Courts.

The opinion of the Supreme Court of the State of California as to which a review is sought was rendered on December 16, 1955, and is reported in Vol. 45 Advance California Reports 790 (No. 23, issued Dec. 27, 1955).[1] An earlier opinion written by the District Court of Appeal of the State of California laid down a rule contrary to that announced by the state Supreme Court. This

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[1]Cited as 45 A. C. 790; also reported in 291 P. 2d 433; see Appendix, p. 57.

opinion was dated April 28, 1955, and is reported in Vol. 132 Advance California Appellate Reports at page 688.[2] Copies of each of these opinions are set forth in the Appendix to this petition.

II.

The Final Judgment of State Court.

The original judgment was one in a declaratory relief proceeding rendered by the Superior Court of the State of California, In and For the County of Los Angeles,[3] on April 19, 1954, and entered on April 26, 1954. The above-mentioned decision of the state Supreme Court, dated December 16, 1955, now constitutes the final judgment of record. Following the decision by the state Supreme Court, and within the fifteen days permitted by Rule 27 of that court's Rules on Appeal, petitioners petitioned for a rehearing in which they again urged the importance of correctly interpreting the Defense Production Act of 1950.[4] This petition for rehearing was denied by the state Supreme Court, without opinion, on January 5, 1956, thereby leaving no further remedies available to petitioners in the state courts.

III.

Effort Made to Obtain Rehearing in State Supreme Court.

On January 5, 1956, petitioners filed a Petition with the California Supreme Court that the remittitur be stayed pending the action by this Honorable Court on petitioner's

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[2]Cited as 132 A. C. A. 688. Also reported in 282 P. 2d 983; see Appendix, p. 39.

[3]The trial court.

[4]64 Stat. 807 and 64 Stat. 811 amended by 65 Stat. 136, 50 U. S. C. A., App. 2105, *et seq.*

contemplated Petition for Writ of Certiorari. Notwithstanding this, the state Supreme Court made an order on January 12, 1956, denying petitioners' petition that the remittitur be stayed, and the basis for this action of the state Supreme Court is that there is no final judgment by it until the remittitur has been sent from the Clerk of the Supreme Court to the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, and, therefore, there could be no final judgment from which a Petition for Writ of Certiorari could be filed until such time as the remittitur has been forwarded to the Clerk of the said Superior Court. Since the denial of the petitioner's Petition for Stay of Remittitur, the remittitur was filed with the Clerk of the Superior Court of the State of California on January 20, 1956, and the decision of the Supreme Court of the State of California is now final in all respects.

IV.

Statute Conferring Jurisdiction to Review.

The section which appears to confer jurisdiction to review this decision is Section 1257(3) of Title 28, United States Code.[5] This section permits certiorari where petitioners have claimed immunity from liability in reliance upon a Federal Statute. In this instance, it is claimed that the Defense Production Act of 1950 confers such immunity by rendering void the contract as construed by the state Supreme Court. The state Supreme Court construed the contract as providing for the payment of premium pay upon the termination of wage controls, even though the stipulated Wage Board approval was never forthcoming. Such a construction is either er-

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[5]62 Stat. 929, 28 U. S. C. A. 1257(3).

roneous, in which event no liability would exist to pay such premium pay, or if the contract merits such a construction, the contract would then be void as contrary to the provisions and the declared purposes and objectives of the Defense Production Act.

V.

Question Presented for Review.

The question presented for review is whether an agreement could lawfully be made, during the period when wage controls were in operation under the Defense Production Act of 1950, specifying an increase in compensation which would become effective and start to accrue when wage controls were terminated. At all times, petitioners have contended that the contract never expressed such an intent, and the decision of the District Court of Appeal sustained them in this position. The state Supreme Court held to the contrary, and also ruled that a contract providing for increased pay to take effect upon the termination of wage controls was not void as being in violation of the Defense Production Act of 1950. If the contract, as construed by the state Supreme Court, did violate the Defense Production Act, it would be void and no rights could accrue thereunder. According to the construction applied by the District Court of Appeal, the contract did not violate the Defense Production Act, for the reason that it did not contemplate any premium pay commencing to accrue unless and until approved by the Wage Board, which approval never took place. Thus, the decision that the premium pay provisions in the contract were, nevertheless, valid squarely presents the issue as to the meaning and construction of the Defense Production Act of 1950.

VI.

Federal Statutes Involved.

The Defense Production Act of 1950 states:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title . . ."
>
> 64 Stat. 807 amended by 65 Stat. 136, 50 U. S. C. A., App. 2105.

> "Any person who wilfully violates any provision of section 405 of this title (section 2105 of this Appendix) shall be guilty of a misdemeanor and shall upon conviction thereof, be subject to a fine of not more than $10,000, or to imprisonment for not more than one year, or both."
>
> 64 Stat. 811 amended by 65 Stat. 136, 50 U. S. C. A., App. 2109.

The express purposes of the Act are:

> ". . . To prevent inflation . . .; to protect the national economy against future loss of needed purchasing power by the present dissipation of individual savings; and to prevent a future collapse of values."
>
> 64 Stat. 803, 50 U. S. C. A., App. 2101.

VII.

Statement of the Case.

The petitioners, sixty separate retail grocery enterprises, each having one or more stores in the Los Angeles area, had signed identical collective bargaining contracts with respondent union governing the terms of hire of their store clerks. These were dated January 1, 1950,

and were to expire on April 1, 1951. [Clk. Tr. p. 19, *et seq.*]

As of September 22, 1950, the parties modified the above agreement in several respects such as by granting increases in wages, implementing a health and welfare plan for the clerks, and extending the terms of the original agreement until December 31, 1955, with annual reopening rights being limited to negotiating of changes in straight time hourly rates of pay. [Sec. 6(b) of Modification Agreement, Clk. Tr. p. 25.]

Two weeks earlier, on September 8, 1950, the Defense Production Act of 1950 had been enacted, and the parties anticipated the imposition of wage controls by providing for negotiations on a broader basis than merely straight time hourly rates in the event that such wage controls might at any time prevent the parties from freely negotiating on, and placing in effect, any changes in straight time hourly rates. [Sec. 8(b) of Modification Agreement, Clk. Tr. p. 27.]

Wage controls were imposed by Executive Order No. 10434 of the President on January 24, 1951. At the next annual reopening in December, 1951, the respondent union's demands for negotiation on fringe items such as premium pay, as well as on straight time hourly pay increases, resulted in two further contracts. One of these, conveniently called "the January 1st Agreement," gave the clerks the highest pay increases then permitted under the Wage Board regulations. [Clk. Tr. p. 215, lines 2-7.] It also cancelled further reopening rights during the remainder of the five-year term, and substituted semi-annual wage changes based upon the cost of living indexes at such times. It also provided for a four cents per hour annual automatic increase. [Clk. Tr. p. 28.]

The other contract was a Submission Agreement whereby the parties submitted to arbitration the respondent union's demands for premium pay increases for night work and for work on Sundays and holidays. After specifying the union's demands for these fringe items, and for the determination thereof by the Board of Arbitration, the Submission Agreement stated:

> "If such award provides for any change in premium pay, such award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the Award shall be the date upon which it is approved by the Board, if such approval is necessary."

On May 12, 1952, the Board of Arbitration made its determination. [Ans., Clk. Tr. p. 42.] The award of the majority granted respondent union's premium pay demands with respect to night, Sunday and holiday work.

In order to bring the matter before the Wage Stabilization Board, the parties in the Submission Agreement agreed to file a joint petition with the Board. This was in accord with existing regulations. The parties therefore jointly signed the petition necessary to submit the matter of the three premium pay items to the Regional Wage Stabilization Board for its determination. [Ans., Clk. Tr. p. 43.]

The Regional Wage Stabilization Board had been authorized by the National Board to approve or deny petitions filed under specific regulations including General Wage Regulation 13. The resolution providing this authority stated:

> "1. The Regional Boards, under the supervision and direction of the National Board through its

> Executive Director, are authorized to process and act upon (approve, modify or deny) petitions for approval of adjustments in wages, salaries and other compensation with respect to the following: . . ." (Wage Stabilization Board Res. No. 64, adopted Sept. 18, 1951, revised July 3, 1952, C. C. H. Emer. Labor Law Rep., par. 20,010.)

The regulations further provided for review by the National Board of the decision of any regional Board upon its own motion or upon the filing of a petition for review. (General Wage Procedural Regulations, Sec. 4.5, adopted Sept. 20, 1951, C. C. H. Emer. Labor Law Rep., par. 19,115.)

The Board found that two of the items, the premium pay increases for night and holiday work, were not permissible under the regulations and these were denied approval. The third item, the Sunday premium pay increase, was approved and placed into effect. It is not in dispute. A petition for rehearing was filed by respondent union with the Regional Wage Stabilization Board concerning the two items which had been denied approval. Petitioners did not join because they did not accept as accurate the statistics as to the area practice relied upon by the respondent union and which were submitted to the Board by respondents. [Clk. Tr. p. 216, lines 1-32; Rep. Tr. p. 79.] Furthermore, there was no agreement, or requirement under the regulations, that petitions so join.

A rehearing was granted, and following the rehearing, the Board reaffirmed its previous ruling and denied the two premium pay items which are involved in this action. Thereafter, respondent union petitioned the National Board for review of the decision of the Regional Board.

The National Board had failed to take any action at the time controls were terminated on February 6, 1953, by Executive Order.

On January 28, 1953, which was approximately one week before the President's decontrol order, petitioners filed this action for declaratory relief in the California Superior Court to obtain a decree determining whether, upon the termination of wage controls, an obligation would arise to pay the night and holiday premium pay for work performed after the date of such termination of wage controls. On April 26, 1954, a judgment was entered decreeing that the obligation to pay such premium pay did arise as of the date of such termination. This judgment was reversed by the District Court of Appeal on April 28, 1955.[6] That Court said that any construction of the Submission Agreement to create such a liability would render the document void as violative of the Defense Production Act of 1950. The California Supreme Court thereafter reviewed the case and ruled contrary to the ruling of the District Court of Appeal.[7] In so ruling, the Supreme Court attempted to distinguish between a contract which called for payment of increases retroactively after controls were terminated, and a contract which called for non-retroactive payments which were to start upon the termination of controls.[8]

Such a distinction is not a logical or a realistic one because whatever was presently promised, during the period of wage controls, to take effect upon their termination, would have an immediate value and would, therefore, stimulate inflation. Such an attempted distinc-

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[6]Appendix, p. 39.
[7]Appendix, p. 57.
[8]Appendix, p. 66.

tion would limit the effect of Federal wage stabilization policy to cash payments, totally failing to recognize that a note or a simple agreement to pay is merely a form of deferred payment. The following example will illustrate this:

Suppose that an employee is receiving the maximum pay allowed under wage controls of $100 per week. He demands $200 per week as the price for remaining on the job and passing up a job at a defense plant. The parties, knowing that no higher wage is then approvable, agree upon $300 per week with the additional $200 to commence when it is approved by the Wage Board, or, failing in that, when wage controls are terminated. There is no Wage Board approval, but wages are decontrolled. Under the decision of the state Supreme Court, it would be perfectly legal to make such a contract, and to start the payments upon the termination of wage controls, in spite of the employee's right forthwith to borrow money on such a contract, and the likelihood that he would immediately purchase many items on time payments in the expectation that he would soon begin to enjoy the higher wage of three times his present salary.

VIII.

Federal Question Urged From Inception of Case.

The Federal question herein presented was first presented to the trial court prior to the rendition of its decision. The complaint for declaratory relief stated the question in defining the controversy as follows:

> "That an actual controversy and dispute concerning the meaning and construction of the Submission Agreement exists between plaintiffs and defendants as follows:

"1. Defendants contend that if and when the restrictions and controls imposed by the United States Government upon wages are terminated, that the above-described premium pay for night work and holiday work shall automatically become due and payable from the plaintiffs for all such work performed by plaintiffs' retail food clerk employees immediately following the termination of such wage restrictions and controls, regardless of whether or not the Wage Stabilization Board shall have approved or disallowed the award of such premium pay. That the defendants have demanded that plaintiffs shall commence the payment of such premium pay for work performed on nights and holidays as soon as such restrictions and controls upon wages have been terminated.

"2. The plaintiffs dispute the above-described contention of the defendants, and contend that there shall never be any duty on the part of plaintiffs to pay any such premium pay for night work and holidays unless and until such premium pay is specifically allowed and approved by the Wage Stabilization Board in accordance with the statutes of the United States governing wages, and that under the terms of the Submission Agreement, approval of such premium pay by the Wage Stabilization Board is a condition precedent to any liability and duty on the part of plaintiffs to pay such night and holiday premium pay.

"3. The defendants dispute the contentions of the plaintiffs as set forth under subparagraph 2 hereinabove." [Clk. Tr. pp. 13-14.]

The briefs which were filed with the trial court are not a part of the record; however, the trial court's Memo-

randum Decision[9] shows that the point was directly presented at the time of the trial although the court does not cite the most persuasive authorities which petitioners had cited on the subject. The court says in its decision:

> "Plaintiffs' second point is this: That contracts for the payment of compensation which are subject to Wage Stabilization Board approval are effective only to the extent that the Board approves such compensation. This is true, of course, so long as such approval is required by law.
>
> "As I read them, the cases cited by plaintiffs in support of this contention are not applicable to the facts of this case. There can be no argument with the proposition as stated in *Morford v. Bellanca Aircraft Corporation,* 67 Atl. 542 (Del.) that 'any agreement for an unapproved increase in wages is illegal; it is contrary to public policy and is not enforceable in the courts.' This is necessarily the rule where the contract attempts to circumvent controls with respect to compensation payable for services rendered during the period when wage stabilization is in effect. It does not appear, however, that the parties are prohibited from contracting during the controlled period for a higher wage scale to become effective when controls are removed and relating only to services to be rendered after Board approval is no longer required as a matter of law. (*Cf. Nussenbaum v. Chambers and Chambers* (Mass.), 77 N. E. 2d 780.) The agreements between the parties hereto entered into on January 1, 1952, do not purport to provide for any future bonus payments for past services, and, as in this case, expressly anticipate the removal of wage controls. It is significant that all

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[9]Appendix, p. 9.

the cases cited by plaintiffs relate to the legality of contracts for the employment of individuals in which provisions were made for additional compensation for services rendered during the period of controls. Here, on the other hand, by their agreements of January 1, 1952, the parties undertook to set the scale of wages and benefits for a period ending December 31, 1955, subject to Board approval in certain instances so long as such approval was required, and expressly agreed that there should be no reopening of negotiations during the life of the agreements. These agreements are not void as being contrary to public policy." [Appendix, pp. 8 and 9; and Clk. Tr. pp. 193-194.]

The trial court also dealt with the subject in its Conclusions of Law which were signed concurrently with its judgment. The following are the pertinent parts of these Conclusions:

"The provisions of said Submission Agreement with respect to approval of the said arbitration award by the Wage Stabilization Board, did not create or constitute a condition precedent to the finality of said award with respect to the said premium pay; that such previsions expressed only the legal requirement of federal government approval.

"V.

"The said Submission Agreement is not void as contrary to public policy.

"VI.

"Such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to said Executive Order No. 10434, such legal requirement was eliminated with the necessary result

that the changes in compensation contained in said award could thereafter lawfully go into effect without the approval of any governmental body." [Appendix, p. 30; and Clk. Tr. p. 222.]

The point was again fully presented in the briefs before the District Court of Appeal, where the court embraced petitioners' position, without qualification. It said:

"Since no agreement was ever made that the disputed premium pay should become effective upon the lifting of controls, respondents are in unfortunate plight. To make such agreement while wage controls were effective would have been unlawful as violative of federal statutes. Wage controls could easily be evaded if employers might promise additional inducements payable after the passing of the national emergency. Such an agreement would be illegal. (De La Rama S. S. Co. v. Pierson, 174 Fed. 2d 84; Morford v. Bellanca Aircraft Corporation (Del.), 67 A. 2d 542, 545.) Wages could not be stabilized if such tricks were perpetuated by industry. The only way to effect the purpose of respondents and to make the premium pay effective now, is to make an agreement to such effect. In the absence thereof, respondents cannot by their *ipse dixit*, reverse a judgment that went against them during the emergency.

"*In re* Pringle Engineering & Manufacturing Company, 164 Fed. 2d 299, holds that the terms of a contract must be determined by the law in effect when the contract is made. Therefore, it is the law in force at the time of the agreement of the parties that determines whether it is valid. (12 Am. Jur. 659, sec. 164; Northern P. R. Co. v. Wall, 241 U. S. 87; 60 L. Ed. 905; Willcox v. Edwards, 162 Cal. 455, 461.)

"If any contract subsists for the premium wages, it was executed during the period of wage controls and is therefore illegal and inoperative. No rights grew out of it and none inhere in it. When the President's order was issued, it terminated the controls, and the regulations no longer interfered with industry's contracting with labor. But since contracts made during the period of controls contrary to statute are void, no rights may be asserted as having originated with such contract. The asserted increases are without substance."

The state Supreme Court, in holding contrary to the District Court of Appeal, said:

"While wage controls existed, collective bargaining agreements providing for a wage increase needed wage board approval, whether such approval was mentioned in the agreement or not; but except as above noted, the agreement itself, even if not approved, was not unlawful. Rather only the making of payments under an unapproved agreement was unlawful. Thus, upon the termination of wage controls, the necessity for wage board approval disappeared and there only remained the parties' lawful contract expressing the terms of their agreement." (45 A. C. at p. 796; and Appendix, pp. 62-63.)

It further said:

"The requirement of government approval for performance of a contract does not invalidate a lawful contract. (Nussenbaum v. Chambers & Chambers (Mass.), 77 N. E. 2d 780, 782-783.) During the period of wage controls, the function of the wage board was not to determine the merits of awarded pay increases pursuant to agreements reached between the contracting parties, but only to determine whether such increases would be inflationary in their

effect upon the nation's economy. Contrary to the argument of *amici curiae* for plaintiffs, the establishment of wage controls did not indicate that wage board approval was intended to operate as a yardstick in relation to the merit of negotiated pay increases; that until such approval was obtained, there was no effective contract between the parties; and unless approval was had before the termination of wage controls, there was nothing left of the parties' contract. Here the payment of the awarded increases would not be in violation of the law as wage controls had been terminated. Plaintiffs do not claim that the parties intended that any awarded increases which might take effect, either by reason of wage board approval or the termination of the requirement for such approval, should constitute, in reality, retroactive, increased payments for work previously performed. Therefore the cases cited by plaintiffs—De La Rama S. S. Co. v. Pierson, 174 Fed. 2d 84, and *In re* Pringle Engineering & Mfg. Co., 164 Fed. 2d 299—condemning intentional efforts to circumvent the wage control law by subterfuge, have no bearing on the question presented here." (45 A. C. pp. 798 and 799; Appendix pp. 65-66.)

The Petition for Rehearing which petitioners filed with the state Supreme Court again stressed the error in so construing the Defense Production Act of 1950 as to permit the making of contracts during any period of wage controls which would become enforceable upon the termination of controls. A copy of the Petition for Rehearing is reprinted in the Appendix, attached hereto, at page 69.

IX.

Reasons for Granting Petition.

The question thus decided by the California Supreme Court does not appear to have ever been determined by this Court, although, on several occasions, the question has been dealt with in other courts, including some United States Courts of Appeal and some United States District Courts. Most of those decisions deal with contracts made during a period of wage controls to pay adidtional compensation after the expiration of wage controls for services performed prior to such termination.[10]

With the exception of one case,[11] these decisions uniformly held such agreements to be void.

The cited decisions cannot be validly distinguished merely because they did not provide for the payment of the increased compensation for services to be performed after the termination of wage controls. The reasoning applied in those cases suggests no grounds for any such distinction. In fact, the reasoning of those cases would apply equally to a situation involving any deferred payment, whether for services performed during controls or for services to be performed after the termination of controls. In either instance, it is the *present promise to pay in the future* which frustrates the policy of the legislation. Furthermore, any attempted legal distinction between contracts dealing with promises to pay in the future would merely invite evasions whereby the contract would specify

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[10]*De La Rama S. S. Co. v. Pierson* (9th Cir., 1949), 174 F. 2d 84 at 86 *et seq.; In re Pringle Engineering & Mfg. Co.* (7th Cir., 1947), 164 F. 2d 299 at 301 *et seq.;* and *Mitchell v. Texas Housing Co.* (Tex. Civ. App., 1954), 265 S. W. 2d 157.

[11]*Nussenbaum v. Chambers & Chambers, Inc.*, 322 Mass. 419, 77 N. E. 2d 780, expressly disapproved in *De La Rama S. S. Co. v. Pierson* (*supra*).

a higher figure for services to be performed after the termination of controls, in order to compensate for services performed during the period of controls. There would exist no means for detecting when such an evasion was being attempted by the parties, and it would be easy to thus circumvent the law.

The only case in which the question was squarely presented is *Joseph Denunzio Fruit Co. v. Crane* (S. D. Cal., 1948), 79 Fed. Supp. 117,[12] where the court, after holding a contract for payment of a procurement charge or commission to be void, said at page 137:

> "Although the contract in this case was made on October 3, 1944 (when there was a ceiling on the grapes), counsel for Joseph Denunzio takes the position that M. P. R. 426 *(supra)* would likewise be ineffective in this case for the reason that title to the grapes was not to pass until after December 10, 1944, at which time there was no ceiling thereon (the O.P. A. ceiling price on grapes having been removed on October 10, 1944), but the court is of the opinion that if this contract was invalid when made, its invalidity would not be removed by the lifting of the ceiling price on the grapes on October 10, 1944."

In conclusion, we emphasize that the question as to the necessary statutory construction is, indeed, a vital one. Twice within the last decade, this country has been subjected to legislative economic controls. The perimeter of permissability should now be clearly defined so as to avoid future confusion and to promote an efficient administration of controls. It must be defined in a manner consonant with the stated purpose of the legislation which

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[12]Aff'd (9th Cir., 1951), 188 F. 2d 569.

will insure that subterfuges are not utilized for the purpose of nullifying the Act; otherwise, it will always be a simple matter for an employer, acting under pressure from his employees, to circumvent the law by promising his employees compensation ostensibly for future services but actually for present services.

Petitioners are not in the inequitable position of having knowingly entered into a contract which violated the law. They have contended, from the outset, that only that portion of the premium pay which was expressly approved by the Wage Board should ever commence to accrue,[13] and they have claimed that this is the only reasonable construction which the language of the contracts permits. The state Supreme Court by adopting a contrary construction of the contracts has invoked the erroneous interpretation of the Defense Production Act of 1950.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HAROLD F. COLLINS,
Attorney for Petitioners.

JAMES A. MCLAUGHLIN,
Of Counsel.

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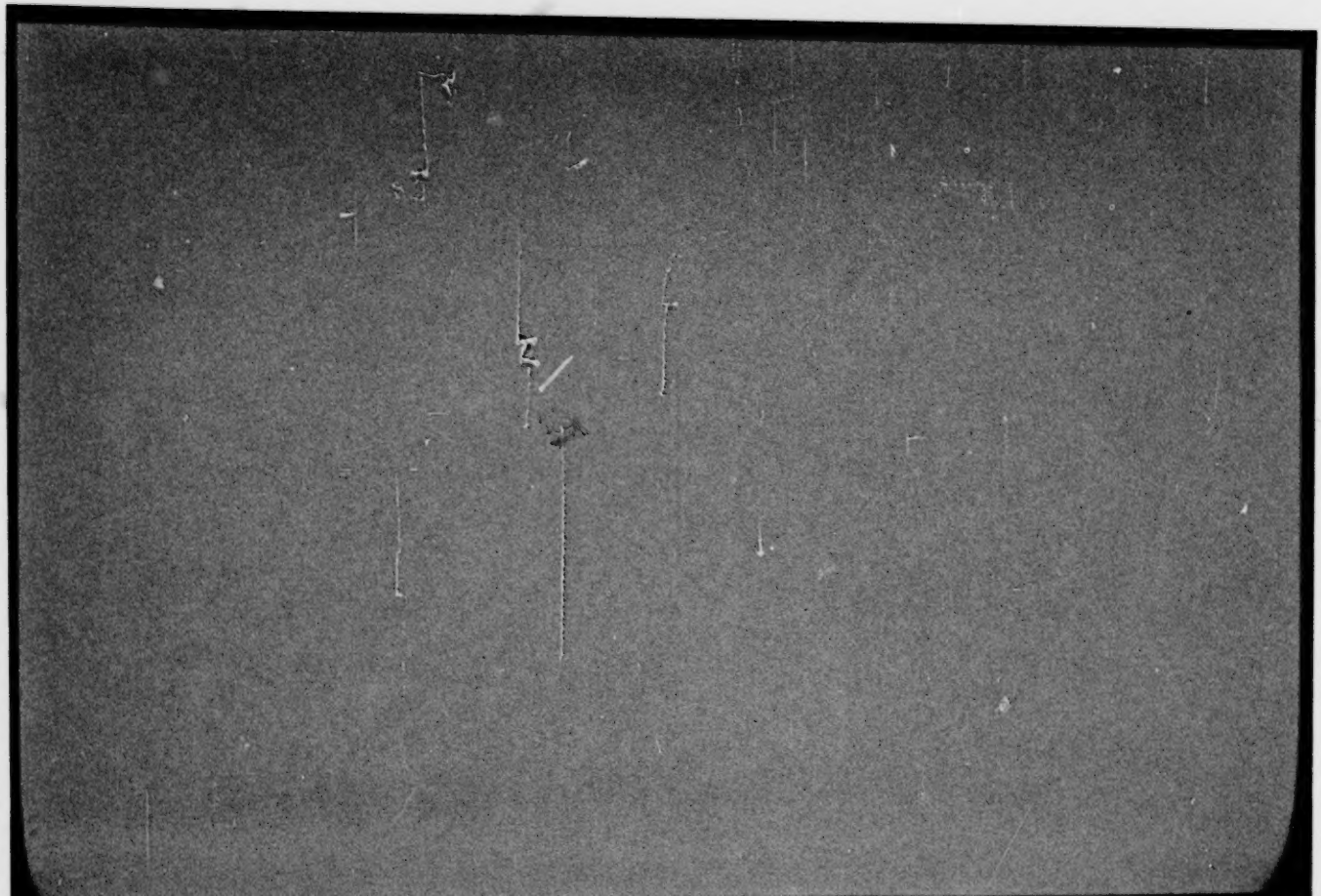
[13]Original Complaint for Declaratory Relief, Clk. Tr. pp. 13-14.



APPENDIX.

In the Superior Court of the State of California in and for the County of Los Angeles.

Alpha Beta Food Markets, Inc., a corporation, *et al.*, Plaintiffs, vs. Retail Clerks International Association, etc., *et al.*, Defendants.

Joseph T. DeSilva, individually, etc., Cross-complainant, vs. Alpha Beta Food Markets, Inc., a corporation, *et al.*, Cross-Defendants. No. 608,982.

Filed Jan. 15, 1954.

Memorandum Decision.

On January 28, 1953, plaintiffs filed their complaint for declaratory and injunctive relief. In April, 1953, defendant Joseph T. DeSilva, individually and in a representative capacity for and on behalf of the Retail Clerks Union, Local No. 770, filed a cross-complaint against the original plaintiffs and several new parties as cross-defendants, also seeking declaratory relief. Issues were joined and the case came on for trial in September, 1953, at which time plaintiffs dismissed their action against all defendants except DeSilva and Local No. 770, and the cross-complainant dismissed as to all cross-defendants except the original plaintiffs, certain defaulting cross-defendants, and Food Employers Council, Inc.

When the case was tried the remaining defendants stipulated in open court that there would be no strike or other work stoppage in the event of a decision adverse to them in the proceedings for declaratory relief. Accordingly, plaintiffs stated that no evidence would be offered in support of their complaint for injunctive relief

and that the issue was withdrawn from the consideration of the Court.

The defendants remaining before the Court asked leave to file an amendment to their answer, and have filed a memorandum of points and authorities in support of their request which is not opposed by plaintiffs. I am satisfied that leave to file the proposed amendment should be granted.

At the trial, counsel, at the suggestion of the Court, entered into extended stipulations as to the facts upon which the issues must be determined. The net results of these stipulations have been reduced to writing in the form of proposed Findings of Fact which conclude with the following statement of the controversy which is before the Court for decision (Par. IX):

"That an actual controversy and dispute concerning the true meaning and construction of the Submission Agreement exists between plaintiffs and defendants as follows:

"1. Defendants contend that the arbitration award created a final and binding obligation on the parties; that the reference to Wage Stabilization Board in the Submission Agreement constituted only a recognition of the legal requirement and not a condition precedent. That with the promulgation of the President's Executive Order on February 6, 1953, the legal requirement was obviated and hence the arbitration award became effective as of May 12, 1952, or in the alternative, such legal requirement was satisfied by the President's approval of all pending petitions and the arbitration award became effective as of February 6, 1953. Defendants further contend that if the Submission Agreement be construed to require Wage

Stabilization Board approval as a condition precedent, that the fulfillment of such condition was excused by the termination of the Wage Stabilization Board and the President's Executive Order of February 6, 1953. That any such condition precedent was not a part of the consideration of the contract and that the enforcement of it would result in a forfeiture of defendants rights. Defendants further contend that the action of the President in his order of February 6, 1953, constitute an approval of all petitions then pending including the petition for approval of premium pay herein and that such approval constituted fulfilment of said condition precedent, if any.

"2. That the plaintiffs dispute all of such contentions except that they concede that the award of the arbitrator was and now is a contract between the parties since the date it was rendered, but in this connection they contend that such contract must be read and construed with the Submission Agreement which is also a part of the contract of the parties and that the award is necessarily limited and conditioned by the terms and provisions contained in the Submission Agreement. Plaintiffs further contend that there shall never be any duty on the part of plaintiffs to pay any premium pay awarded in the arbitration award for night and holidays, for the reason that the payment of such premium pay was conditioned upon its first being approved by the Wage Stabilization Board and upon any such premium pay starting to accrue from the date of such approval. Plaintiffs further contend that under the terms of the Submission Agreement and of the January 1st Agreement, the parties dealt specially with such premium pay and embodied terms and conditions with respect to its becoming due and payable which were different from the terms and conditions specified as to

the increases which all were agreed to in the January 1st Agreement, and that a comparison of the provisions of these two agreements evidences a clear intent on the part of the parties to require the payment of any such premium pay only if and when the same was approved by the Wage Stabilization Board in accordance with the statutes and regulations governing the activities of that Board.

"3. The defendants dispute the contentions of plaintiffs as set forth under paragraph 2 hereinabove."

At the conclusion of plaintiff's case defendants moved for a judgment of nonsuit on the complaint and cross-complainant moved for judgment on the pleadings on the cross-complaint. The Court reserved rulings on these motions on stipulation that all the evidence would be introduced so that the case could be decided on the merits in the event the motions were denied. The trial was then completed and the matter has now been submitted on briefs.

Before stating my conclusions I wish to compliment counsel and thank them for their co-operation in expediting the trial of the case and for the thoroughness of their briefs. Each, to adopt Mr. McLaughlin's phrase, has found numerous decisions and dicta to support their respective positions and have done so promptly. Co-operation and assistance of this sort are always appreciated by the Court and are to be commended.

An action for declaratory relief is equitable in character. I am satisfied that in this case the equity and the law are on the side of defendants and cross-complainants. In the interest of saving time I am stating my conclusions in response to the points argued by counsel, with some brief comments in respect thereto.

I.

The "Condition Precedent."

The provisions of the Submission Agreement with respect to approval of the Award by the Wage Stabilization Board do not create a condition precedent to the finality of the Award with respect to premium pay.

It is not necessary to review the history of the collective bargaining between the parties. The Extension and Modification Agreement permitted the reopening of negotiations with respect to straight time hourly wages only. The same agreement, anticipating renewal of wage controls by the Federal government which might restrict subsequent wage reopenings, also provided for bargaining on other demands by the Union with respect to terms of employment. The Defense Production Act of 1950 became law in September, 1950. Thus when negotiations were renewed in 1951, resulting in the agreements of January 1, 1952, the demands involved in those two agreements were proper subjects of negotiation.

In the 1951 negotiations the Union's demands were considered with respect to (1) increases in straight time hourly pay, (2) cost-of-living adjustments and an annual "improvement factor" increase, (3) additional premium pay, and (4) increased payments by the employer to the Health and Welfare Fund. The demand for additional premium pay is the subject of the Submission Agreement. The other three demands were settled by the January 1, 1952 Agreement. Plaintiffs correctly state that these two documents must be read together.

I also agree with plaintiffs that "it is clear that the parties, by the January 1st Agreement and by the Submission Agreement were implementing increases which

were to be governed by and subject to the laws and regulations relating to Wage Stabilization." In certain particulars the two agreements refer to the approval of the Wage Stabilization Board if required. But plaintiffs, despite their criticism of the opinion of the Supreme Court of Montana in Atlantic Pacific Oil Co. v. Gas Development Co., 69 P. 2d 750, do not appear to question the validity of the rule there stated that the agreements "would have been fully as binding upon the parties if the clause had been omitted entirely, the parties would be just as fully bound to observe the regulations of the government if no mention had been made in the operating agreements. Governmental regulations cannot be varied or evaded by private contract, and the insertion of the controverted clause in the agreements was a useless gesture. It adds nothing to nor takes anything away from the expressed and implied obligations of the parties as set out in the operating agreements." This is merely a restatement of the familiar rule that "all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into it and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated." (12 Cal. Jur. 2d Contracts, sec. 135, p. 348.)

With this rule in mind the parties agreed that the increases in straight time pay should become effective immediately because they came within the formula specified by existing regulations. As the law then existed the effective dates of the other three items were necessarily dependent in one way or another on affirmative approval by the Wage Stabilization Board. As to the premium pay arbitration involved here, plaintiffs say:

"In this connection, it is important to keep in mind that the defendant union predicated its demands for this additional premium pay upon the existence of wage controls which precluded the union from receiving straight time hourly rates of pay in an amount in excess of those permitted by the regulations of the Wage Stabilization Board. In other words, the defendant union and the plaintiff employers, in agreeing to submit the question of premium pay to a board of arbitrators, were acting with the knowledge that the Wage Stabilization Board requirements would have to be complied with and that if any premium pay was awarded, it could not become effective unless formally approved by the Wage Stabilization Board."

Precisely the same situation existed on January 1, 1952 with respect to the other two matters. In all three instances the parties were looking to the future, and anticipated that Board approval might not be necessary at the time the agreed increase in pay would otherwise take effect. Thus, the cost-of-living adjustment and the annual improvement factor increases could only take effect at future dates during the life of the agreement; hence such increases were to be submitted to the Board as those dates arrived "unless and until such approval becomes unnecessary." The agreement as to premium pay increases could only come into existence if such pay were awarded by the arbitrators at a future date; hence, it was agreed that the award, if any, should be submitted to the Board "if then so required," and that the increase would take effect on the date of approval by the Board, "if such approval is necessary. If such approval is not required, the effective date shall be the date of said award." Again, the additional future payments by the employers into the Health and Welfare Fund were to "commence

upon approval by the Wage Stabilization Board, or shall be retroactive to April 1, 1952, whichever is earlier." This is simply another way of saying that these payments should commence on April 1, 1952, if Board approval was not necessary at that time.

Seeking to differentiate these several contract references to Board approval, plaintiffs say:

"If such award should be made at a time when Board approval was not required, it was provided that the award would be effective when made. If, on the other hand, the award was made at a time when Wage Stabilization Board approval was a legal condition precedent to effectiveness thereof, the parties had the choice of specifying either that the award would become effective only if approved by the Wage Stabilization Board or that the award would become effective upon such approval by the Board, or upon such approval becoming unnecessary."

I am satisfied that the language adopted by the parties in the Submission Agreement must be interpreted as intending to express the second alternative suggested by plaintiffs. Had the parties intended to adopt the first alternative they could readily have used the word "only" as now used by their counsel. This they did not do.

II.

The Effect of Termination of Wage Stabilization Laws and Regulations.

Plaintiffs' second point is this: That contracts for the payment of compensation which are subject to Wage Stabilization Board approval are effective only to the extent that the Board approves such compensation. This is true, of course, so long as such approval is required by law.

As I read them, the cases cited by plaintiffs in support of this contention are not applicable to the facts of this case. There can be no argument with the proposition as stated in Morford v. Bellanca Aircraft Corporation, 67 Atl. 542 (Del.) that "any agreement for an unapproved increase in wages is illegal; it is contrary to public policy and is not enforceable in the courts." This is necessarily the rule where the contract attempts to circumvent controls with respect to compensation payable for services rendered during the period when wage stablization is in effect. It does not appear, however, that the parties are prohibited from contracting during the controlled period for a higher wage scale to become effective when controls are removed and relating only to services to be rendered after Board approval is no longer required as a matter of law. (*Cf.* Nussenbaum v. Chambers and Chambers (Mass.), 77 N. E. 2d 780.) The agreements between the parties hereto entered into on January 1, 1952, do not purport to provide for any future bonus payments for past services, and, as in this case, expressly anticipate the removal of wage controls. It is significant that all the cases cited by plaintiffs relate to the legality of contracts for the employment of individuals in which provisions were made for additional compensation for services rendered during the period of controls. Here, on the other hand, by their agreements of January 1, 1952, the parties undertook to set the scale of wages and benefits for a period ending December 31, 1955, subject to Board approval in certain instances so long as such approval was required, and expressly agreed that there should be no reopening of negotiations during the life of the agreements. These agreements are not void as being contrary to public policy.

III.

The Executive Order of February 6, 1953.

Plaintiffs argue that the Executive Order of February 6, 1953 terminating wage controls did not satisfy the contractual condition precedent of the Submission Agreement.

In view of my conclusion that the Submission Agreement did not establish a condition precedent requiring Board approval it seems unnecessary to discuss this contention. However, plaintiffs' argument with reference to this Order would seem to bear out my conclusions stated above. Thus, in accepting Mr. Killingsworth's statement explaining the Order, plaintiffs must of necessity accede to the proposition that upon the signing of the orders employers were "free to make the changes in compensation proposed in the petitions," just as much as they became free "to enter into new agreements implementing the pay which had not been permissible under the regulations. Grant that the Order "did not attempt to direct the parties to effectuate," that is to say, to negotiate "such new agreements," on plaintiffs' own statement of the point the Order did free the employers to carry into effect the changes already agreed on and "proposed in the petition" which, until the Order was signed, were subject to Board approval as a matter of law, regardless of the expressed agreement of the parties to seek such approval.

IV.

Effective Date of Award.

I am much inclined to agree with plaintiffs' contention that the Executive Order of February 6, 1953, did not have the legal effect of constituting "approval" of the

Award, but believe it is unnecessary to determine the point in view of my conclusion that such approval was not a condition precedent to the effective date of the Award. The only point left for determination, then, is the effective date of the Award.

The Submission Agreement reads as follows:

"If such Award provides for any change in premium pay, such Award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the Award shall be the date upon which it is approved by the Board, if such approval is necessary. If such approval is not required, the effective date shall be the date of said Award. In no event, however, shall the Award be effective prior to April 1, 1952."

The Award is dated May 12, 1952, at which time Board approval was required. On July 2, 1952, the Regional Board approved the Award of premium pay for work performed on Sundays, and the employers having been making such payments since then. The remaining portions of the Award not approved by the Regional Board were pending before the Board on February 6, 1953.

On the date of the Award submission to the Board for approval was "required." The parties accordingly complied with their agreement and submitted the Award for approval by their joint petition. It seems to me that the provision in the Submission Agreement that "if such approval is not required, the effective date shall be the date of said Award" relates only to the legal requirement for approval on the date of the Award; if approval was not then required, submission to the Board would not have been necessary and the Award would have taken effect on May 12, 1952.

Since approval was required on May 12, 1952, the matter was properly submitted to the Board. Thereafter, Board approval was a continuing legal requirement until February 6, 1953, when all controls were terminated by the Executive Order. I doubt that the Executive Order constituted "approval" of the Award. Had that been the case the effective date of the Award would of course have been the date of the Executive Order. On the other hand, I do not believe that the Excutive Order should be given retroactive effect. So far as we are concerned here, the Order simply terminated controls, thus eliminating as of that date the legal requirement of Board approval, with the necessary result that the changes in compensation contained in the Award could then lawfully go into effect without the approval of any governmental body. It follows that the effective date of the Award is February 6, 1953.

Upon the filing of this memorandum, the Clerk will enter a minute order granting defendants' motion for leave to file their Amendment to Answer, denying defendants' motion for judgment of nonsuit on the complaint, denying cross-complainants' motion for judgment on the pleadings, and directing judgment for the defendants and cross-complainants for declaratory relief. Counsel for defendants and cross-complainants will complete and serve the necessary findings of fact, conclusions of law and the proposed judgment which may be settled on objections in conference in chambers if desired.

Dated: January 15, 1954.

PHILBRICK McCOY,

[Clk. Tr. pp. 186-197.] *Judge.*

In the Superior Court of the State of California, in and for the County of Los Angeles.

Alpha Beta Food Markets, Inc., a corporation, *et al.*, Plaintiffs, v. Retail Clerks International Association, an unincorporated voluntary association, *et al.*, Defendants.

Joseph DeSilva, individually and in a representative capacity, for and on behalf of Retail Clerks Union, Local No. 770, an unincorporated association its officers and members, Cross-Complainant, v. Alpha Beta Food Markets, Inc., a corporation, *et al.*, Cross-Defendants. No. 608982.

Findings of Fact and Conclusions of Law.

The above entitled action came on regularly for trial in Department 27 of the above entitled Court, the Honorable Philbrick McCoy, Judge, presiding, on Thursday, September 24, 1953, a jury trial having been expressly waived by the respective parties, plaintiffs and certain cross-defendants appearing by James A. McLaughlin of the firm of McLaughlin & Casey, and Harold F. Collins of the firm of Wright, Peeler & Garrett, their attorneys, and certain defendants and cross-complainants appearing by Bodle & Landye, by George E. Bodle and Daniel Fogel, their attorneys, at which time evidence, both oral and documentary, on behalf of plaintiffs and defendants was received, stipulations were entered into, and the plaintiffs having dismissed as to all defendants except Retail Clerks Union Local No. 770, an unincorporated voluntary association, and Joseph T. DeSilva, and cross-complainant having dismissed as to all cross-defendants except those for whom an answer was filed to the cross-complainant herein, and those whose default has been taken

as is shown by the record on file, and the trial of said case having been completed on the 25th day of September, 1953, and having been argued and submitted to the above entitled Court for its decision, and the Court having duly considered the evidence, arguments and stipulations of counsel, and being fully advised in the premises, now files its Findings of Fact as follows:

Findings of Fact.

I.

Plaintiffs Alpha Beta Food Markets, Inc.; Alexander's Markets; Better Food Markets, Incorporated; The Boys Market, Inc.; Harry Caplan, Incorporated; Carl's Ranch Markets, Incorporated; Crawford Stores, Inc.; Farmers Marketing Company, Inc.; Fitzsimmons Stores, Ltd.; Gateway Good Stores, Inc.; Godfrey Food Co., Inc.; Hiram's Ranch Markets; Jurgensens; King Cole Markets, Inc.; Lasarow Bros., Inc.; M M Foods, Inc.; Marks Food Corporation; McDaniels Markets; Market Basket; The Model Grocery Co.; Pessin Grocery Company; Raisin Markets, Incorporated; Ralphs Grocery Co.; Roths Markets, Inc.; Stewart Bros. Markets, Inc.; Valley Foods, Inc.; Von's Grocery Co.; and Western Industries Corporation are now and have been at all times herein mentioned corporations organized and existing under the laws of the State of California, and having their principal places of business in the County of Los Angeles, State of California.

Plaintiff Safeway Stores, Incorporated, is now and has been at all times herein mentioned a corporation organized and existing under the laws of the State of Maryland, and duly qualified to transact business in the State of California.

Plaintiff Futterman and Gach is now and has been at all times herein mentioned a corporation organized and existing under the laws of the State of California, doing business under the fictitious firm name of Shoppers Markets; plaintiff West Shore Company is a corporation organized and existing under the laws of the State of California, doing business under the fictitious firm name of Esko, Inc.; plaintiff Food Stores, Inc., is a corporation organized and existing under the laws of the State of California, doing business under the fictitious firm name of Hales Food Marts; plaintiff Harry Caplan, Inc., is a corporation organized and existing under the laws of the State of California, doing business under the fictitious firm name of Carl's Mkts. #6; plaintiff Harry Caplan is an individual doing business under the fictitious firm name of Carl's Ranch Markets; plaintiff Owl Drug Co. is a corporation organized and existing under the laws of the State of Nevada, duly qualified to transact business in the State of California, doing business under the fictitious firm name of Big Owl Market; plaintiffs Henry J. Carty, Agnes M. Carty and Donal Arthur Carty are now and have been at all times herein mentioned copartners, doing business under the fictitious firm name of Carty Bros.; plaintiffs Max Schwartz, Abe Schwartz and Ben Schwartz are now and have been at all times herein mentioned copartners, doing business under the fictitious firm name of Foods Co.; plaintiffs Irving Moss, Philip Harris and Nathan B. Moss are now and have been at all times herein mentioned copartners, doing business under the fictitious firm name of Hiram's Country Store; plaintiff Walter L. Weick is an individual doing business under the fictitious firm name of W. L. Lawrence Produce; plaintiff Harold F. Roberts, also

known as H. F. Roberts, is an individual doing business under the fictitious firm name of Roberts Market; plaintiffs Albert Kaliff, David Stein and Jerome Stein are now and have been at all times herein mentioned copartners, doing business under the fictitious firm name of Kings Food Center; plaintiff Paul Kodimer is an individual doing business under the fictitious firm name of A B C Market; plaintiff George B. Kellick is an individual doing business under the fictitious firm name of George's Market; plaintiff William F. Matsuno is an individual doing business under the fictitious firm name of Golden State Produce Co.; plaintiff Leo Z. Jelin is an individual doing business under the fictitious firm name of Cracker Barrel; plaintiff La Babe G. Corey is an individual doing business under the fictitious firm name of Meadow Market; plaintiffs Dan Monson and Larry Monson are now and have been at all times herein mentioned copartners, doing business under the fictitious firm name of Circle "M" Market; plaintiff Max Garth is an individual doing business under the fictitious firm name of Best Food Market.

Plaintiffs Harry Glickman, Milton Glickman and Phil Glickman are now and have been at all times herein mentioned copartners; plaintiffs Sam Serber and Yetta Serber are now and have been at all times herein mentioned copartners; plaintiffs Joseph P. Hughes and Elsa PK. Hughes are now and have been at all times herein mentioned copartners; plaintiffs Cliff Hall and Victor O. McGaughey are now and have been at all times herein mentioned copartners; plaintiffs George Seltzer and Tony Pericone are now and have been at all times herein mentioned copartners; that each of said plaintiffs is now, and was at all times herein mentioned, a member of Food Employers Council, Inc.

Cross-defendant Panorama Market Company, erroneously sued herein as Carl Titleman, doing business under the fictitious name of Panorama Markets, is a corporation organized and existing under the laws of the State of California; cross-defendant Cummings Markets, Inc., is a corporation organized and existing under the laws of the State of California; cross-defendant Mayfair Companies is a corporation organized and existing under the laws of the State of California, doing business under the fictitious name of Mayfair Markets; cross-defendants Eugene Gelson, Bernard Gelson and David Lasenhky are copartners, doing business under the fictitious firm name of Gelson Market.

The above named cross-defendants have heretofore stipulated that their default in this action may be taken.

Cross-defendant Food Employers Council, Inc., is a non-profit membership organization, organized and existing under the laws of the State of California; said cross-defendant Council is a non-profit corporation composed of members who are engaged in the food business in Southern California; the total number of its members who have collective bargaining agreements with defendant Union is 115, among whom are plaintiffs herein.

All of the individual plaintiffs and cross-defendants herein named are now and have been at all times herein mentioned residing in the County of Los Angeles, State of California.

II.

Defendant Retail Clerks Union Local No. 770 is now and has been at all times herein mentioned an unincorporated voluntary association, functioning as a labor organization, and a member and affiliated with the American

Federation of Labor, a national labor organization, and having as its members in excess of 12,000 retail clerks employed in the retail food and drug industry in Los Angeles and vicinity. Said defendant will hereafter be referred to as "defendant Union." The said defendant Union is now and has been at all times herein mentioned maintaining its office and place of business in the County of Los Angeles, State of California, and the members of such defendant Union are now and have been at all times herein mentioned residing in the County of Los Angeles, State of California. Defendant and cross-complainant Joseph T. DeSilva is now and has been at all times herein mentioned the Executive Secretary of defendant Retail Clerks Union Local No. 770.

III.

Plaintiffs are now and have been at all times herein mentioned each operating, maintaining and conducting grocery and food markets in the County of Los Angeles, State of California. In connection with plaintiffs' said businesses, they each regularly stock in such markets and sell to customers and members of the public generally large quantities of groceries, foods, provisions, beverages and dairy products daily; all such groceries, foods, provisions, beverages and dairy products will hereinafter be referred to as "such provisions"; plaintiffs each purchase for their respective markets and cause to be delivered to such markets for such retail sale large quantities of such provisions.

Each of plaintiffs regularly employs large numbers of clerks in connection with the operation of each of plaintiffs' retail food markets for the purpose of stocking shelves in said markets with provisions, assisting cus-

tomers in making purchases of such provisions, and checking out purchases made by purchasers in collecting the purchase prices therefor; all of the said retail food markets are of the self-service character where customers select the provisions which they wish to purchase from the shelves, refrigerators and display racks in such retail food markets; all of the said clerks are members of Retail Clerks Union Local No. 770, with the exception of clerks employed in and about the meat departments operated by plaintiffs in said food markets, and reference herein to the said clerks shall not include clerks and employees employed by plaintiffs in and about their said meat departments.

IV.

On or about the 1st day of January, 1950, each of the plaintiffs and cross-defendants entered into an agreement in writing with the defendant Union; each of the agreements was identical, except that each bore the name of the particular plaintiff or cross-defendant employer signing such agreement as employer; such agreements were designated and captioned as "Retail Food Agreement," and will hereinafter be referred to as "Food Agreement" (plaintiffs' Exhibit 1); such copy is a true and correct copy in all respects, except that the blank spaces for the names of the employers and the names of the persons signing the original or not filled in; said Food Agreement provided that it should remain in effect until April 1, 1951, subject to the right of either party to reopen said agreement for the purpose of negotiating changes in hourly rates of pay by giving thirty (30) days' notice prior to July 1, 1950.

Pursuant to said reopening rights, said Food Agreement was reopened on July 1, 1950; thereafter, and on or

about the 22nd day of September, 1950, plaintiffs and defendant Union entered into an agreement in writing captioned and designated as "Extension and Modification of Collective Bargaining Agreement," modifying said Food Agreement; such agreement will hereinafter be referred to as "Extension Agreement" (plaintiffs' Exhibit 1); under and by the terms of the said Extension Agreement, said parties extended the term of the Food Agreement until December 31, 1955, with certain qualifications, more particularly set out therein, which permitted qualified annual reopenings.

V.

On or about the 1st day of October, 1951, pursuant to the provisions of the Extension Agreement, the defendant Union gave notice to plaintiffs and cross-defendants of its desire to negotiate modifications therein, and thereafter served upon said plaintiffs and cross-defendants its proposals for changes and modifications (cross-complainant and defendants' Exhibit "A"); among the changes proposed by the defendant Union were the following: (1) vacations; (2) guarantee of call-in pay; (3) provisions for over-time and sixth day; (4) provisions for part-time clerks; (5) provisions to regulate the working day and to define the work week; (6) apprenticeship provisions; (7) provisions concerning higher rates of pay for department heads; (8) sick leave; (9) wage increases; and (10) increased premium pay for Sundays, night work and holidays; throughout the negotiations concerning the defendant Union's demands, the defendant Union asserted and contended that it was not limited to negotiating only straight time hourly rates of pay adjustments, in accordance with the limitations set forth under

Article 6(b) of the Extension Agreement, but that by reason of restrictions imposed by the laws and regulations of the United States concerning wage increases, said defendants asserted that they were entitled to demand and bargain concerning matters other than straight time hourly rates of pay.

VI.

Thereafter, and on or about January 6, 1952, plaintiffs and cross-defendants and defendant Union entered into an agreement in writing, captioned "Agreement," and referred to hereinafter as the "January 1 Agreement" (plaintiffs' Exhibit 2); concurrently therewith, cross-defendant Council and defendant Union entered into an agreement in writing, entitled "Submission Agreement" (plaintiffs' Exhibit 2).

Cross-defendant Council executed said Submission Agreement pursuant to express authority from its members, including plaintiffs herein; thereafter cross-defendants and each member of cross-defendant Council, including plaintiffs herein, affected by said Submission Agreement, individually executed a duplicate thereof with defendant Union; under and pursuant to the terms of the Submission Agreement, plaintiffs, cross-defendants, each member of cross-defendant Council, and defendant Union agreed to arbitrate certain demands of the Union therein set forth for increased premium pay for night, Sunday and holiday work.

At the time of the execution of the January 1 Agreement and the Submission Agreement, the straight time hourly increases in wages granted pursuant to said January 1 Agreement, represented the highest increase then permissible under the rules and regulations of the Wage Stabilization Board without prior approval thereof.

Said Submission Agreement provided, as follows:

"If such award provides for any change in premium pay, such award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the Award shall be the date upon which it is approved by the Board, if such approval is necessary. If such approval is not required, the effective date shall be the date of said Award."

VII.

Between the dates of March 17, 1952, and March 29, 1952, a hearing was held before the arbitrators specified in the said Submission Agreement, and thereafter, and on or about the 12th day of May, 1952, a majority of the three arbitrators, to wit: Hubert Wyckoff and James Landye, signed an arbitration award in which all of the demands of the defendant Union, as set forth in the said Submission Agreement, were granted and allowed in full, that is, the said two arbitrators, in and by their award, granted premium pay for night work, Sundays and holidays, in the amounts specified in the Union's proposals, which are set forth under paragraphs (A), (B) and (C) of the Submission Agreement.

VIII.

Thereupon, pursuant to the terms of the said Submission Agreement, Food Employers Council, Inc., and defendant Union signed and caused to be filed with the Twelfth Regional Wage Stabilization Board in San Francisco, California, a petition to approve the payment of such premium pay; on or about June 17, 1952, cross-defendant Council, in connection with said pending petition, filed with said Twelfth Regional Wage Stabilization

Board a copy of the dissent of William French Smith, a member of the Board of Arbitration, to the Award handed down therein; that at the time the defendant Union filed the said petition, it also filed with the Twelfth Regional Wage Stabilization Board documentary evidence in support of said petition; that such documentary evidence had been submitted by the defendant Union to cross-defendant Council, and the cross-defendant Council had notified the defendant Union that it would not act as co-sponsor to such documentary evidence for the reason that it did not agree with the accuracy of such documents in all respects; that its only obligation under the Submission Agreement was to sign as a joint petition WSB Form 100, and that it had no obligation to join in any narrative statement which would be inconsistent with the position of the food industry in the arbitration, or the said dissenting opinion of Mr. William French Smith; and thereupon the defendant Union was told that it might file the said documents under its own sponsorship and responsibility, which the defendant Union thereupon did.

Thereafter, and on the 27th day of June, 1952, the said petition came on for hearing before the said Twelfth Regional Wage Stabilization Board, and on July 2, 1952, said Twelfth Regional Wage Stabilization Board made a ruling wherein and whereby it refused to approve the said petition except as to the premium pay for work performed on Sundays, and refused to approve the payment of the premium pay awarded for night work and holiday work in said arbitration award.

Thereafter, defendant Union requested cross-defendant Council to join with it in petitioning the Twelfth Regional Wage Stabilization Board for a rehearing on its decision

relating to holiday and night premium pay; that cross-defendant Council refused to join with defendant Union in petitioning said Twelfth Regional Wage Stabilization Board for a rehearing.

Thereupon, the defendant Union filed a petition with the said Twelfth Regional Wage Stabilization Board, requesting a rehearing on the matter as to holiday and night premium pay; that such rehearing was thereafter granted, and the said Twelfth Regional Wage Stabilization Board held such rehearing in Los Angeles, California, on July 11, 1952; that at said hearing cross-defendant Council appeared on behalf of its members, including plaintiffs, in opposition to the Union's position, as set forth in said petition for rehearing; that, in addition, certain of plaintiffs appeared at said rehearing and stated that if premium pay for nights and holidays was approved, the effect thereof would be inflationary; that at said hearing, the defendant Union appeared with its representatives who made oral statements, and the cross-defendant council appeared along with certain cross-defendants who made oral statements which conflicted with those made by the Union representatives; that on or about July 24, 1952, said Twelfth Regional Wage Stabilization Board affirmed its prior ruling of July 2, 1952, and refused to approve the payment of said premium pay for holiday and night work.

Thereafter, the case was transferred to the Wage Stabilization Board in Washington, D. C., for review and decision, pursuant to the rules and regulations of the Wage Stabilization Board; that no further action or proceedings were taken with respect to the said matter by the Wage Stabilization Board or by the Wage Stabilization Committee; that said petition was still pending on

February 6, 1953; that on February 6, 1953, the President of the United States signed and issued an order (Executive Order 10434) terminating wage controls (cross-complainant's Exhibit "B"); that the following is a true copy of said order:

"Whereas the production of materials and services and the demand therefor in the national economy are approaching a practicable balance; and

"Whereas the earliest possible return to freedom of collective bargaining in the determination of wages will serve to strengthen the national economy and thereby the national security; and

"Whereas the stabilization of wages, salaries and other compensation is not now necessary to carry out the purpose of the Defense Production Act; and

"Whereas, in view of the foregoing, it is appropriate to permit adjustment of wages, salaries and other compensation arrived at through the processes of free collective bargaining or other voluntary action to become effective;

"Now, Therefore, by virtue of the authority vested in me by the constitution and statutes, including the Defense Production Act of 1950, as amended, and as President of the United States, it is hereby ordered as follows:

"1. All regulations and orders issued pursuant to the Defense Production Act of 1950, as amended, stabilizing wages, salaries and other compensation, are hereby suspended.

"2. The wage, salary and other compensation adjustments proposed in petitions pending before wage and salary control agencies may now be placed in effect without the approval of such agencies. To the extent that

agreements involved in such petitions are conditioned upon approval under Title IV of the Defense Production Act, this order shall be deemed such approval, but such approval shall be subject to paragraph 3 hereof.

"3. This order shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date."

IX.

An actual controversy and dispute concerning the true meaning and construction of the Submission Agreement exists between plaintiffs and defendants as follows:

1. Defendants contend that the arbitration award created a final and binding obligation on the parties; that the reference to Wage Stabilization Board in the Submission Agreement constituted only a recognition of the legal requirement and not a condition precedent; that with the promulgation of the President's Executive Order on February 6, 1953, the legal requirement was obviated, and hence, the arbitration award became effective as of May 12, 1952, or, in the alternative, such legal requirement was satisfied by the President's approval of all pending petitions and the arbitration award became effective as of February 6, 1953. Defendants further contend that if the Submission Agreement be construed to require Wage Stabilization Board approval as a condition precedent, the fulfilment of such condition was excused by the termination of the Wage Stabilization Board and the President's Executive Order of February 6, 1953; that any such condition precedent was not a part of the consideration of the contract, and the enforce-

ment of it would result in a forfeiture of defendants' rights. Defendants further contend that the action of the President in his order of February 6, 1953, constitutes an approval of all petitions then pending, including the petition for approval of premium pay herein, and that such approval constituted fulfilment of said condition precedent, if any.

2. Plaintiffs dispute all of such contentions, except they concede that the award of the arbitrator was and now is a contract between the parties since the date it was rendered, but, in this connection, they contend that such contract must be read and construed with the Submission Agreement, which is also a part of the contract of the parties, and that the award is necessarily limited and conditioned by the terms and provisions contained in the Submission Agreement. Plaintiffs further contend that there shall never be any duty on the part of plaintiffs to pay any premium pay awarded in the arbitration award for nights and holidays, for the reason that the payment of such premium pay was conditioned upon its first being approved by the Wage Stabilization Board, and upon any such premium pay starting to accrue from the date of such approval. Plaintiffs further contend that under the terms of the Submission Agreement and of the January 1 Agreement, the parties dealt specially with such premium pay, and embodied terms and conditions with respect to its becoming due and payable which were different from the terms and conditions specified as to the increases which all were agreed to in the January 1 Agreement; that a comparison of the provisions of these two agreements evidences a clear intent on the part of the parties to require the payment of any such premium pay only if and when the same was approved by the Wage

Stabilization Board, in accordance with the statutes and regulations governing the activities of that Board.

3. Defendants dispute the contentions of plaintiffs, as set forth under paragraph 2 hereinabove.

X.

The provisions of the Submission Agreement with respect to approval of the award by the Wage Stabilization Board did not create or constitute a condition precedent to the finality of the award with respect to the said premium pay. Such provisions expressed the legal requirement of federal government approval, only; that such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to said Executive Order 10434, such legal requirement was eliminated.

XI.

Cross-defendants Panorama Market Company, erroneously sued herein as Carl Titelman, doing business under the fictitious name of Panorama Markets; Cummings Markets, Inc.; Mayfair Companies; and Eugene Gelson, Bernard Gelson and David Lasensky, which cross-defendants are mentioned in paragraph I hereof as having stipulated that their default in this action may be taken, have entered into a further stipulation with the cross-complainant that said cross-defendants and each of them and defendant Retail Clerks Union Local No. 770 agreed to be bound by the Submission Agreement; that the arbitration award was rendered pursuant to said Submission Agreement; that said award is binding upon the said cross-defendants and each of them to the same extent as it is binding upon plaintiffs and answering cross-

defendants in this action; that any judgment entered in this action against plaintiffs and such cross-defendants as answered the amended cross-complaint herein may be entered as to the cross-defendants named in this paragraph and each of them; and that as to said named cross-defendants Findings of Fact and Conclusions of Law are expressly waived.

XII.

Each and all of the allegations and denials set forth in plaintiffs' complaint or in the answers of plaintiffs or cross-defendant Food Employers Council, Inc., to the amended cross-complaint herein, inconsistent with the Findings of Fact herein, are untrue.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW.

I.

The said Joseph T. DeSilva was a proper party to file the cross-complaint and the amended cross-complaint herein, individually and in a representative capacity, for and on behalf of Retail Clerks Union Local No. 770, an unincorporated association, its officers and members.

II.

Cross-defendant Food Employers Council, Inc., was and is a proper party cross-defendant to this action.

III.

Plaintiffs, cross-defendants, each member of cross-defendant Food Employers Council, Inc., and defendant Retail Clerks Union Local 770 are bound by the terms of said Arbitration Award.

IV.

The provisions of said Submission Agreement with respect to approval of the said arbitration award by the Wage Stabilization Board, did not create or constitute a condition precedent to the finality of said award with respect to the said premium pay; that such provisions expressed only the legal requirement of federal government approval.

V.

The said Submission Agreement is not void as contrary to public policy.

VI.

Such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to said Executive Order No. 10434, such legal requirement was eliminated with the necessary result that the changes in compensation contained in said award could thereafter lawfully go into effect without the approval of any governmental body.

VII.

The effective date of said arbitration award as to premium pay for nights and holidays is February 6, 1953, for all work performed after said date. Thereafter, plaintiffs, cross-defendants and the members of cross-defendant Food Employers Council, Inc., have been and are obligated to pay to said retail clerks employed by them and covered by the said collective bargaining agreements between plaintiffs, cross-defendants, members of the

cross-defendant Food Employers Council, Inc., and defendant Retail Clerks Union Local 770, the premium pay for nights and holidays, set forth in said arbitration award, together with interest at seven percent (7%) per annum on each portion of the total amount now due to any such person thereunder, from the regular payroll date on which such portion first became due and payable for work performed by such person, and was not paid.

VIII.

Defendants Retail Clerks Union Local 770 and defendant and cross-complainant Joseph T. DeSilva, individually, and in a representative capacity, for and on behalf of Retail Clerks Union Local 770, an unincorporated association, its officers and members, are entitled to judgment in conformity with the Findings of Fact and Conclusions of Law, and for costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated: This 19th day of April, 1954.

PHILBRICK McCOY,
Judge of the Superior Court.

[Clk. Tr. pp. 207-224.]

Received copy of the within Findings of Fact and Conclusions of Law this 13th day of April, 1954.

McLAUGHLIN & CASEY,
By JAMES A. McLAUGHLIN,
Attorneys for Plaintiffs and Cross-Defendants.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Alpha Beta Food Markets, Inc., a corporation, *et al.*, Plaintiffs, v. Retail Clerks International Association, an unincorporated voluntary association, *et al.*, Defendants:

Joseph T. DeSilva, individually and in a representative capacity, for and on behalf of Retail Clerks Union, Local No. 770, an unincorporated association, its officers and members, Cross-Complainants, v. Alpha Beta Food Markets, Inc., a corporation, *et al.*, Cross-Defendants. No. 608982.

Filed April 20, 1954.

Entered April 26, 1954, Book 2714, page 81, by E. Lizen, Deputy.

Judgment.

The above entitled action came on regularly for trial in Department 27 of the above entitled Court, the Honorable Philbrick McCoy, Judge presiding, on Thursday, September 24, 1953, a jury trial having been expressly waived by the respective parties, plaintiffs and certain cross-defendants appearing by James A. McLaughlin of the firm of McLaughlin & Casey, and Harold F. Collins of the firm of Wright, Peeler & Garret, their attorneys, and certain defendants and cross-complainants appearing by Bodle & Landye, by George E. Bodle and Daniel Fogel, their attorneys, at which time, evidence, both oral and documentary, on behalf of plaintiffs and defendants was received, stipulations were entered into, and the

plaintiffs having dismissed as to all defendants except Retail Clerks Union Local 770, an unincorporated voluntary association, and Joseph T. DeSilva, and cross-complainant having dismissed as to all cross-defendants except those for whom an answer was filed to the cross-complainant herein and those whose default has been taken as is shown by the records on file, and the trial of said case having been completed on September 25, 1953, and having been argued and submitted to the above entitled Court for its decision, and the Court having duly considered the evidence, arguments and stipulations of Counsel, and being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith.

Now, Therefore, by reason of the law and Findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That each of the following named plaintiffs and cross-defendants, Alpha Beta Food Markets, Inc.; Alexander's Markets; Better Food Markets, Incorporated; The Boys Market, Inc.; Harry Caplan, Incorporated; Carl's Ranch Markets, Incorporated; Crawford Stores, Inc.; Farmers Marketing Company, Inc.; Fitzsimmons Stores, Ltd.; Gateway Food Stores, Inc.; Godfrey Food Co., Inc.; Hiram's Ranch Markets; Jurgensens; King Cole Markets, Inc.; Lasarow Bros., Inc.; M M Foods, Inc.; Marks Food Corporation; McDaniels Markets;

Market Basket; The Model Grocery Co.; Pessin Grocery Company; Raisin Markets, Incorporated; Ralphs Grocery Co.; Roths Markets, Inc.; Safeway Stores, Incorporated; Stewart Bros. Markets, Inc.; Valley Foods, Inc.; Von's Grocery Co.; Western Industries Corporation; Futterman and Gach, doing business under the fictitious firm name of Shoppers Market; West Shore Company, doing business under the fictitious firm name of Esko, Inc.; Food Stores, Inc., doing business under the fictitious firm name of Hales Food Marts; Harry Caplan, Inc.; doing business under the fictitious firm name of Carl's Mkt. #6; Harry Caplan, doing business under the fictitious firm name of Carl's Ranch Markets; Owl Drug Co., doing business under the fictitious firm name of Big Owl Market; Henry J. Carty, Agnes M. Carty and Donal Arthur Carty, doing business under the fictitious firm name of Carty Bros.; Max Schwartz, Abe Schwartz and Ben Schwartz, doing business under the fictitious firm name of Foods Co.; Irving Moss, Philip Harris and Nathan B. Moss, doing business under the fictitious firm name of Hiram's Country Store; Walter L. Weick, doing business under the fictitious firm name of W. L. Lawrence Produce; Harold F. Roberts, also known as H. F. Roberts, doing business under the fictitious firm name of Roberts Market; Albert Kaliff, David Stein and Jerome Stein, doing business under the fictitious firm name of Kings Food Center; Paul Kodimer, doing business under the fictitious firm name of A B C Market; George B. Kellick, doing business under the fictitious firm name of George's Mar-

ket; William F. Matsuno, doing business under the fictitious firm name of Golden State Produce Co.; Leo Z. Jelin, doing business under the fictitious firm name of Cracker Barrel; La Babe G. Corey, doing business under the fictitious firm name of Meadow Market; Dan Monson and Larry Monson, doing business under the fictitious firm name of Circle "M" Market; Max Garth, doing business under the fictitious firm name of Best Food Market; Harry Glickman, Milton Glickman and Phil Glickman, copartners; Sam Serber and Yetta Serber, copartners; Joseph P. Hughes and Elsa K. Hughes, copartners; Cliff Hall and Victor O. McGaughey, copartners; George Seltzer and Tony Perricone, copartners; M. B. Ziskin; Sam Newman; J. R. Dahl; Arsen Melickian; Oscar O. Johnsen; Vaughn Bowen; and Food Employers Council, Inc., and the following named cross-defendants, Panorama Markets Company, erroneously sued herein as Carl Titelman, doing business under the fictitious name of Panorama Markets; Cummings Markets, Inc.; Mayfair Companies, doing business under the fictitious name of Mayfair Markets; and Eugene Gelson, Bernard Gelson and David Lasensky, doing business under the fictitious firm name of Gelson Market, and each of the members of cross-defendant Food Employers Council, Inc., now is and has been at all times since on and after the 6th day of February, 1953, obligated to pay to each person employed by it under that certain Agreement between it and Retail Clerks Union Local 770, entitled "Retail Food Agreement," effective January 1, 1950, as

the same has been or may be extended, modified, amended, or renewed, the premium pay as set forth below for night work and holiday work performed by each such person after February 6, 1953, and during the term or existence of the said Agreement as the same has been or may be extended, modified, amended or renewed, on the regular payroll date following the payroll period in which such night or holiday work has been performed by such person:

(a) For all time worked after 6:00 P. M., and before 6:00 A. M., the pay shall be at the rate of time and a half of the straight time hourly rate provided for in said Agreement as the same has been or may be extended, modified, amended or renewed, except that when the meat department in the store closes at 6:00 P. M., such pay shall begin at 7:00 P. M. The maximum amount to be paid in addition to straight time rates shall not exceed $2.00 per shift of not to exceed eight hours worked, and when the eighth hour of work is exceeded and the premium pay is no longer applicable, time and one-half of the said straight time hourly rate shall be paid. The premium pay for Box Boys for all hours worked as above designated shall be $1.50 per hour.

(b) For all work performed on any of the following holidays, New Year's Day, Memorial Day, Independence Day, Labor Day, Armistice Day, Thanksgiving Day and Christmas Day, two times the straight time hourly rates of pay shall be paid in addition to the regular day's pay, provided for in said Agreement, as the same has been or may be extended, modified, amended or renewed;

together with interest at seven percent (7%) per annum on each portion of the total amount now due to any such person, under the provisions of this paragraph, from the regular payroll date on which such portion first became due and payable for work performed by such person, and was not paid; provided that , if any such future modification or amendment to said Agreement, as modified, extended, renewed or amended, shall change the obligation under the same of any plaintiff, cross-defendant, or member of cross-defendant Food Employers Council, Inc., to pay such premium pay to any person or persons employed by it, there shall be no obligation hereunder on the part of such plaintiff, cross-defendant or member of cross-defendant Food Employers Council, Inc., to pay premium pay to such person or persons employed by it for work done on and after the date of such modification or amendment.

2. That the effective date of the arbitration award dated May 12, 1952 (which is in evidence herein as Plaintiff's Exhibit 3 and which is referred to in the pleadings on file herein and in the Findings of Fact) with respect to night and holiday premium pay is February 6, 1953.

3. That defendant Retail Clerks Union Local 770 and defendant and cross-complainant Joseph T. DeSilva, individually and in a representative capacity, for and on behalf of Retail Clerks Union Local 770, an unincorporated association, its officers and members, have judgment against said plaintiffs and cross-defendants, and each of

them, for costs herein, taxed at $77.40. The clerk is ordered to enter the decree.

Dated: April 19, 1954.

PHILBRICK McCOY,
Judge of the Superior Court.

[Clk. Tr. pp. 225-230.]

Received copy of the within Judgment this 13th day of April, 1954.

McLAUGHLIN & CASEY,
By JAMES A. McLAUGHLIN,
Attorneys for Plaintiffs and Cross-Defendants.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Alpha Beta Food Markets, *et al.*, Plaintiffs, Cross-Defendants and Appellants, vs. Retail Clerks International Association, Retail Clerks Union, Local 770, *et al.*, Defendants, Respondents, and Joseph T. DeSilva, Cross-Complainant and Food Employers Council, Inc., *et al.*, Cross-Defendants, Appellants. Civ. No. 20715.

April 28, 1955.

Opinion of the District Court of Appeal.

Appeal from the Superior Court, Los Angeles County. Philbrick McCoy, Judge.

Musick, Peeler & Garrett, by Harold F. Collins, and McLaughlin & Casey, by James A. McLaughlin for Appellants.

Bodle & Landye, George E. Bodle, Daniel Fogel, Leo Geffner for Respondents and Cross-Appellant.

Gibson, Dunn & Crutcher, by William French Smith, *Amicus Curiae.*

Appeal from a judgment of declaratory relief.

After a long history of collective bargaining, on January 1, 1950, the parties executed a "Retail Food Agreement." It was to be effective for 15 months but could be reopened prior to July 1, 1950, on the request of either party on 30 days' notice for the purpose of negotiating changes in hourly rates. As a result of the union's notice, on September 22, 1950, the parties executed a "Modification Agreement," extending and modifying the Food Agreement. The terms of the new agreement extended the Retail Food Agreement to December 31, 1955, provided it might be opened annually for negotiating changes only

in straight time hourly rates of pay. Before the Modification Agreement had been executed the Korean conflict began and to meet the emergencies that might arise, the Defense Production Act of 1950 (U. S. C. A., Sec. 2061 *et seq.*) was enacted. It provided for the stabilization of wages. Thereupon the parties made provision in the Modification Agreement, section 8 b, to the effect that *in the event wages should be controlled by the federal government and such controls should nullify the wage increase effective January 1, 1951, the parties will be entitled to reopen negotiations for premium payments.* In other words, there could be no negotiations for premium payments unless the national government should impose a system of wage controls and only for the period. But because no final agreement was ever made for an increase of wages, and permissible under wage controls, it is readily apparent that no increase was ever agreed upon to be effective upon the abolition of controls.

After wages had been stabilized persuant to the Defense Production Act, the Union gave notice October 1, 1951, to appellants of its desire to negotiate modifications of their agreement with respect to changes of provisions for vacation, guarantee of call-in pay, overtime and sixth day, part time clerks, defining work week, apprenticeships, rates of pay for department heads, sick leave, wage *increase, increased premium pay for Sundays, night work and holidays.* Under date of January 1, 1952, an agreement was executed whereby certain changes and conditions were mutually made, no part of which is involved in this controversy. A second agreement provided for a submission to the board of arbitration created by the agreement of the following: (1) What, if any, change should be made in the Modification Agreement with

respect to premium pay for (a) night work; (b) for work on Sundays; (c) for work on holidays. That contract was designated as the "submission agreement." On May 12, 1952, the board decided the issue of premium pay in favor of the Union and its members. The award of the arbitration board was submitted to the 12th Regional Wage Stabilization Board. *It did not approve premium pay for night and holiday work,* and on a rehearing, its decision was reaffirmed at Los Angeles on July 11, 1952. Thereafter, pursuant to the rules, the matter was automatically transferred to the Wage Stabilization Board at Washington, D. C. It was there pending at the time President Eisenhower on February 6, 1953, issued his order by which (1) all regulations and orders stabilizing wages were suspended; (2) but as a part of such order it was provided that it should "not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability or offense possessed, incurred, or committed prior to this date."

In their complaint, appellants alleged that a dispute concerning the meaning of the submission agreement exists; that respondents contend that if and when the controls of wages are terminated, the premium pay for night and holiday work shall automatically become payable for all such work performed by appellants' retail food clerk employees immediately following the termination of such wage controls, regardless of whether or not the Wage Stabilization Board shall have approved or disallowed the award of such premium pay. The pleading alleges the contentions of appellants as follows: "Plaintiffs dispute the above-described contention of the de-

fendants and *contend that there shall never be any duty on the part of plaintiffs to pay any such premium pay for night and holiday work unless and until such premium pay is specifically allowed and approved by the Wage Stabilization Board* in accordance with the statutes of the United States governing wages, and that under the terms of the Submission Agreement, approval of such premium pay by the Wage Stabilization Board is a condition precedent to any liability and duty on the part of plaintiffs to pay such night and holiday premium pay."

The court found on such allegations as follows: "The provision of the Submission Agreement with respect to approval of the award by the Wage Stabilization Board did not create or constitute a condition precedent to the finality of the award with respect to the said premium pay. Such provisions expressed the legal requirement of federal government approval, only; that such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to said Executive Order 10434, such legal requirement was eliminated."

The conclusion of the court was: "The provisions of said Submission Agreement with respect to approval of the said arbitration award by the Wage Stabilization Board, did not create or constitute a condition precedent to the finality of said award with respect to the said premium pay; that such provisions expressed only the legal requirement of federal government approval." In accordance with such finding and conclusion, the court adjudged the defendants to be entitled to their premium pay for night and holiday work.

Appellants now demand a reversal of such judgment on the grounds that (1) Wage Board approval of any

award of premium pay was a condition precedent to the accrual of any obligation to pay such premium rates; (2) the President's de-control order was not equivalent to wage board approval. Other matters are urged but they are not pertinent to a decision.

Without section 2 b* of the modification agreement, the respondents could not for five years have negotiated for anything but straight time hourly rates of pay. Section 8 b anticipated wage control. By that section they broadened the scope of demands that might be made, but such demands could not exceed the increases permissible under wage stabilization regulations. The Defense Production Act of 1950 authorized wage freeze. Respondents were willing to limit their negotiations for five years to straight time hourly rates of pay. But if wage controls were imposed, they demanded the right to broaden their demands to include other matters. They demanded everything that was available under wage regulations. This they could do under the provisions of 8 b if straight time pay were limited. That section contemplated a wage ceiling on straight time hourly pay and on fringe benefits as well. In all reason, the parties

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*"(b) It is agreed that in the event any duly authorized and empowered government board of agency established controls over wages and/or working conditions as a result of a national emergency, and only in the event such controls nullify, invalidate, alter or in any way render inoperative or illegal the wage increase effective January 1, 1951, as provided herein, or subsequent wage reopenings in accordance with Paragraph 6(b) of this Agreement, or the employee medical and hospital benefits herein provided, the restrictions set forth in Paragraphs 6(b) and 8(a) limiting the reopening rights of each of the parties to negotiate changes only in the straight time hourly rates of pay, shall be declared inoperative and shall cease to be in effect during any period in which such board or agency exercises controls, provided, however, that neither party shall be obligated at any time during the term of this agreement to bargain collectively with respect to pensions or annuities."

could not have intended straight time hourly pay and not have included also all other benefits. Both parties knew that whatever the result was, it would have to be authorized by law.

After their negotiations had been completed, the parties executed the agreement on January 1, 1952,** which provided that the wage scales attached to such agreement shall be paid to all employees "covered by the aforesaid agreements; provided" that certain amounts shall be withheld until it has been determined that such wage rates are permissible under Wage Stabilization regulations; such amounts so withheld to be paid retroactively to the first Monday of 1952, if it be determined by the

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**"1. Effective as of January 1, 1952, the wage scales attached hereto as Exhibit 'A,' and incorporated herein, shall be paid to all employees covered by the aforesaid agreements. (Retail Food Agreement, January 1, 1950; Modification, January 1, 1951.)

"2. Effective as of July 1, 1952, a cost of living adjustment shall be made and paid to all employees coming under the provisions of this contract amounting to the percentage of increase in the Bureau of Labor Statistics Consumers Price Index, U. S. Average (new series), for the latest date available over the same index as of October 15, 1951. Thereafter, each half year, the cost of living allowance shall be increased or decreased in proportion to the increase or decrease of the latest Bureau of Labor Statistics Consumers Price Index over the index for October 15, 1951. It is agreed and understood that at no time shall such cost of living adjustment result in any decrease of the base rates provided herein and attached hereto as Exhibit 'A,' and as modified by the improvement factor in Section 3 hereof.

"3. On January 1, 1953, an increase of four cents ($.04) per hour shall be added to the base rates provided herein as an improvement factor. Another increase shall be made in the same amount as of January 1, 1954, and another as of January 1, 1955.

"The above increases shall be subject to Wage Stabilization Board approval upon joint petition of the Counsel and the Union, unless or until such approval becomes unnecessary.

"4. It is agreed by the parties hereto that subject to the approval of the Wage Stabilization Board, there shall be contributed to the Retail Clerks Benefit Fund—Local 770—an additional ¼¢ per hour per employee during the life of the Agreement. Such pay-

Union and the Food Employers Council, Inc.*** that such amount is permissible under existing Wage Stabilization regulations. That contract was the first by these parties under their Modification Agreement and the laws governing wage stabilization. It is a fair interpretation or section 8 b that the amount determined to be permissible would be in effect during the entire period of the modification agreement, even if the controls should be subsequently abolished. This conclusion is justified by the facts that straight time hourly rates, Sunday premium pay and other increases, not in dispute, continued in force according to valid agreements of the parties, notwithstanding the abolition of wage controls. Section 8 b contemplated only such increases as were valid under wage controls.

Section 8 b was mutually added to the modification agreement to cover the contingency of wage controls. It

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ment shall commence upon approval by the Wage Stabilization Board, or shall be retroactive to April 1, 1952, whichever is the earlier.

"5. It is further agreed and understood that except as herein amended and except for such changes as may result from the Arbitration Award under the Submission Agreement executed by the parties as of even date hereof, the provisions of the Retail Food Agreement and the Extension and Modification thereof shall remain in full force and effect until December 31, 1955.

"There shall be no reopenings until January 1, 1956 for any purpose. Until such date, wages and working conditions shall be adjusted only as herein provided. Either party may give notice in writing of its intention to amend, alter or terminate this agreement sixty days prior to December 31, 1955.

"It is further agreed and understood that the parties signatory hereto shall incorporate the provisions hereof as well as any changes resulting from the Arbitration Award under the Submission Agreement as of even date hereof, in a new agreement embodying the old provisions reaffirmed herein, as well as the amendments hereinabove provided or referred to, and shall execute such new agreement as soon as can be prepared."

***Agent of appellants.

is not disputed that 8 b could not be effecuated if such controls had never come into existence, because that section applied to fringe benefits only, in the event of wage controls. Section 8 b means that such controls must either nullify or alter the modification agreement in regard to straight time pay in order for the Union to reopen negotiations in regard to any benefits other than straight time pay.

Wage controls were in fact established January 24, 1951. In October of that year, the Union opened negotiations for added benefits under section 8 b contending that because of wage controls they were now entitled to negotiate for the added benefits. This negotiation was opened under the modification agreement which allowed yearly reopenings. As a matter of fact, the most the wage control regulations ever did was to specify certain limits beyond which increases could not go without specific board approval.

Appellants' agreement to a wage increase under the January 1, 1952 agreement resulted from the Union's demands and was in accordance with the modification agreement. It was not an admission that 8 b was in effect. The fact that a cost of living increase was also granted was in accordance with the times and again, appellants waived no rights as to the modification agreement. Section 8 b specified only that the agreement must be nullified and straight time increases disallowed before respondent might negotiate the fringe benefits.

The modification agreement called for a submission of any disputes to a three-man arbitration board. The first question submitted to this board was "what, if any, change should there be?" in the modification agreement in regard to premium pay. The Board of Arbitration ig-

nored the "if any"; failed to rule on this question and granted all of the Union's demands as to fringe benefits.

However, this ruling was only an interim decision. It could not stand by itself and was subject to Wage Stabilization approval. That approval was not forthcoming and after the Union had sustained two adverse decisions by the Regional Wage Stabilization Board, the case was still pending with the National Wage Stabilization Board when controls were abolished. Obviously, the abolition of controls could not suddenly make the Board of Arbitration's award a final judgment, after such award had been twice reversed by the regional Wage Stabilization Board.

Respondents could never have negotiated without wage controls and upon the abolition of such controls, in the absence of a final judgment, the disputed issues (night and holiday pay) should have been abandoned, and the controversies that had arisen in war time should have been consigned to limbo. This means, of course, that all final judgments entered during such period are still in effect.

Respondents never contemplated negotiating for future benefits, and affirmance of the instant judgment would be contrary to their intentions. The modification agreement allowed them to negotiate every year in order that their wage demands would be kept current.

As respondents were never limited by wage controls in their bargaining for straight time pay, even though wage stabilization approval was necessary, and as appellants never waived their right to refuse fringe benefits, since there was no final judgment, this court must hold that as to the disputed questions, respondents never had the

right to negotiate under 8 b for fringe benefits, and certainly not benefits for the future. It is the law that during a period of wage stabilization controls, any contracts between the parties must have been approved by the wage stabilization board. If any part of the wage contract has not been approved by the wage stabilization board, it was not a part of the agreement of the parties. There was nothing to enforce after controls had been abandoned. (*In re* Pringle Engineering and Manufacturing Company, 164 Fed. 2d 299, 301.) The validity of the terms of a contract must be determined by the law in effect when the contract is made. (*Ibid.*)

It was not the abandonment of the controls that might have authorized premium payments but it was the wage controls that had been authorized by the Defense Production Act of September 8, 1950. (*Ibid.*) In Mitchell v. Texas Housing Company, 265 S. W. 2d 157, it was held that "as part and parcel of any agreement for compensation made during controls was the Defense Production Act of 1950, whereby all claims for compensation not permitted by its regulations, whether in *quantum meruit* or otherwise would be manifestly without legal basis and unenforceable." The effect of such holding is that unless respondents established their rights to the premium payments by an order of the Wage Stabilization Board during controls, they had none when the controls were lifted.

The parties entered into negotiation in October, 1951, to increase the current wage scale; yet the award of the disputed premium payments could not take place until the lifting of wage controls, which occurred February 6, 1953. The only two possible theories to sustain respondents' position that there should be a future award are (1) that the parties illegally contracted to circumvent

the wage stabilization board, or (2) that payments were deferred until the future which is not the intent of section 8 b under which negotiations were opened. Neither theory is tenable.

Having shown that respondents left the period of wage stabilization without an approval of their premium payments, it must be readily discernible that they are in a hopeless situation. They are in no better position than they were before wage controls allowed them to negotiate under 8 b. Therefore, they obtained their judgment for their alleged premium payments without legal authority. It is as though their incomplete proceedings had never been initiated or as though they had never negotiated for an allowance of the premium wage payments.

Despite the imposition of wage controls on hourly wage rates the parties agreed that the scope of reopening negotiation was to be broadened, but such was to continue only "during any period in which such board or agency exercises controls." From such language, it must be apparent that the parties contemplated that any agreement arrived at would be effective only during the period of wage controls. If not so restricted, such agreement would be illegal. Neither in section 8 b nor in any other contract does it appear that the parties, in making such contract, contemplated the abandonment of controls. Neither is there evidence that increases were to be effective at a future date. But all negotiations for premium pay items, as well as others, were to occur "only during any period in which such Board or agency controls."

Neither does it appear from any contract that the abolition of controls was to signify the immediate effectiveness of pay increases. Indeed the thesis of respondents on

this appeal is that the increases should date from the arbitration award. Now, the court made no finding that the date of lifting controls was to be the date on which increases agreed upon by the parties were to go into effect. In the absence of such finding or of proof that would justify it, how can it be maintained to the contrary? Despite the importance respondents now attach to such date, they made no allusion to it in any contract. If they had had such thought in mind at the times of the contracts they surely would have insisted upon the mention of abolition of controls at least as forcefully as they insisted upon the adoption of section 8 b and the imposition of controls. Lifting controls did not alter the terms of the contract which had determined that the amount of any increase was to date from the time it was fixed and that it had to be authorized by national regulations.

Respondents do not place themselves in an enviable position. While they concede that both contracts of 1952 were drawn within the purview of section 8 b and claim all benefits conferred by that section, yet they deny the limitations imposed thereby. Not only were the 1952 agreements drawn pursuant to section 8 b, but the documents both disclose that the increases resulting therefrom were to be limited to those authorized by wage regulations. Not only were hourly wage increases, but other wage items were negotiated to the ceilings warranted by the regulations. In no instance did respondents, in negotiating for an increase, attempt to evade the dominance of wage controls. *Amicus curiae* pertinently observes: "If the Union had thought that it was also obtaining increases the total amount of which was sooner or later to be effective irrespective of whether permitted by controls, it is not likely that it would have had such

respect for wage ceilings in its negotiations, a respect clearly shown by the 1952 agreements." In their Submission Agreement as in all others, they provided that if any award of the Board "provides for any change in premium pay, such award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the award shall be the date upon which it is approved by the Board, if such approval is necessary." Such phraseology as the foregoing quotation emphasizes the fact that in agreeing to widen the scope of the reopening during controls, the parties intended only such increases as might be obtained under existing regulations.

With their agreement to such requirements for obtaining increases in pay, how can respondents now maintain that since controls have been lifted, they may disregard the fact that no Wage Stabilization Board ever approved the increases which they now contend are theirs merely because controls were abolished? Inasmuch as the agreement provided that such premium pay should not be allowed until approved by the Wage Stabilization Board, and since the controls and the Stabilization Boards are abolished, does not the new status require either that the issue be submitted to such National Board, even though without official status, or require the parties to reopen negotiations for the purpose of adjusting respondents' claims for premium pay? When the agreement, made during the national emergency, provided that their contest should be finally decided by a national tribunal, there is not decision merely because the national government has abolished such tribunal. The parties had, in good faith, a problem requiring solution. They agreed to have such tribunal resolve their differences. The destruction, deca-

dence or abolition of the tribunal could not, in reason, be deemed tantamount to a judicious consideration of a substantial controversy that pertained to the welfare of either or or both contenders.

If respondents contend that an increase during wage controls might not have been permissible under wage regulations, yet such increase must go into effect when controls were abolished, they not only demand an increase contrary to statute, but also, they reject their own agreement. They must show that although an increase was not permissible under wage regulations yet it must be deemed established when the wage stabilization boards cease to enjoy official status. By the contract of January 1, 1952, it was agreed that if the entire amount of hourly wage increases permissible under existing regulations cannot be paid "then there shall be paid the highest portion of the sum so withheld, that is permitted to be paid under such regulations and such payments shall fully discharge the employers from further liability." Although respondents accepted Sunday premium pay and hourly wage rates upon the theory that it was proper under the national regulations, and although they deny that premium pay increases for nights and holidays are authorized by the same statutes, they now maintain that the latter increases should now be deemed effective by virtue of the abolition of wage controls. Such was not in any agreement of the parties, neither in 8 b nor in the 1952 agreements.

Since no agreement was ever made that the disputed premium pay should become effective upon the lifting of controls, respondents are in unfortunate plight. To make such agreement while wage controls were effective would have been unlawful as violative of federal statutes. Wage controls could easily be evaded if employers might promise additional inducements payable after the passing of the national emergency. Such an agreement would be illegal. (De La Rama S. S. Co. v. Pierson, 174 Fed. 2d 84; Morford v. Bellanca Aircraft Corporation (Del.), 67 A. 2d 542, 545.) Wages could not be stabilized if such tricks were perpetrated by industry. The only way to effect the purpose of respondents and to make the premium pay effective now, is to make an agreement to such effect. In the absence thereof, respondents cannot by their *ipse dixit,* reverse a judgment that went against them during the emergency.

In re Pringle Engineering & Manufacturing Company, 164 Fed. 2d 299, holds that the terms of a contract must be determined by the law in effect when the contract is made. Therefore, it is the law in force at the time of the agreement of the parties that determines whether it is valid. (12 Am. Jur. 659, sec. 164; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905; Willcox v. Edwards, 162 Cal. 455, 461.)

If any contract subsists for the premium wages, it was executed during the period of wage controls and is therefore illegal and inoperative. No rights grew out of it and none inhere in it. When the President's order was

issued, it terminated the controls, and the regulations no longer interfered with industry's contracting with labor. But since contracts made during the period of controls contrary to statute are void, no rights may be asserted as having originated with such contract. The asserted increases are without substance.

The Second Section of the Presidential Proclamation, which stated that all pending petitions before wage boards may now be placed in effect without the approval of such agencies, was interpreted by the respondents to mean the president's order either eliminated the requirement of wage board approval, or in the alternative that the alleged condition precedent of wage board approval was fulfilled.

Section 2, however, was held subject to section 3 which said, "This order shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred or committed, prior to this date."

The president's order did not constitute blanket approval of all pending cases but stated that the employers were then free to make changes in compensation if their petitions were merely up for approval, or if up for review or reconsideration, the employers were free to renegotiate.

The rights of appellants, if the petition were automatically approved, would definitely have been effected under

section 3 of the presidential proclamation. No such approval can be deemed to have been granted under section 1.

Appellants are entitled to due process of law and their day in court. They cannot be deprived of a decision on the automatic appeal to the National Wage Stabilization Board merely by reason of the presidential order lifting controls. Section 3 of the President's order preserves the rights of all parties with petitions or appeals pending. The appellants expressed disapproval of premium payments at all stages of the proceeding. No section of the President's order can be reasonably interpreted as having deprived appellants of their closely guarded and carefully preserved rights. Appellants prevailed before the 12th Regional Wage Stabilization Board at both hearings on the matter of premium pay. Because the law made the automatic appeal to the National Board at Washington is no reason why appellants should be deemed to have lost the ground so gained. In fact, the President's order distinctly declares that it "shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding" with respect to any right possessed "prior to this date." The order was permissive. It did not purport to approve all pending actions.

It follows that respondents cannot contend that the presidential order constituted an automatic reversal. If it should be so decided, it would operate to enter a judgment as to which the Regional Board had firmly held to be contrary to law. Such a result would be contrary to the constitutional doctrine of due process of law.

The question as to the proper joinder of Joseph De Silva and the Food Employers' Council, Inc., is not germane to the issues of this action.

It is ordered that the judgment is reversed; that the trial court is directed to make and enter findings of fact and conclusions of law to the effect that no valid agreement has ever existed between defendants and plaintiffs with respect to night and holiday premium pay and to enter judgment that no sums are due and payable to defendants by plaintiffs and that plaintiffs recover their costs.

MOORE, *P. J.*

We concur.

McCOMB., *J.*

FOX, *J.*

(132 A. C. A. 688; and 282 P. 2d 983.)

In the Supreme Court of the State of California in Bank.

Alpha Beta Food Markets, Inc., a corporation, *et al.*, Plaintiffs, Cross-Defendants and Appellants, vs. Retail Clerks Union Local 770, an unincorporated voluntary association, *et al.*, Defendants and Respondents, and Joseph T. DeSilva, individually and in a representative capacity, for and on behalf of Retail Clerks Union, Local No. 770, an unincorporated association, its officers and members, Defendant, Cross-Complainant and Respondent, and Food Employers Counsel, Inc., Cross-Defendant and Appellant. L. A. 23472.

Filed Dec. 16, 1955.

Opinion of the Supreme Court of the State of California.

This is an appeal from a declaratory judgment holding valid an arbitration award made during the period of wage controls imposed during the Korean conflict. Upon a review of the record, we have concluded that, the undisputed facts sustain the judgment of the trial court.

After a long history of collective bargaining, the parties on January 1, 1950, executed a "Retail Food Agreement" —hereinafter called the "original agreement"—fixing in detail the terms, conditions, and rates of pay for the employment of union members by plaintiffs. This agreement was to be effective for 15 months—until April 1, 1951—subject to the right of either party, by notice given prior to July 1, 1950, to reopen it to negotiate changes in hourly pay rates. Such notice was given by the union and on September 22, 1950, the parties executed an "Extension and Modification Agreement," extending the term of the "original agreement," as modified, to December

31, 1955. It provided that it could be reopened annually but only for negotiating changes in straight time hourly rates of pay. However, before execution of the "modification agreement," the Korean conflict began and the Defense Production Act of 1950 (September 8) was enacted (50 U. S. C. A. App., §2061, *et seq.*), giving the President authority to issue regulations for wage controls. The parties therefore provided in the "modification agreement," section 8(b), that "in the event any duly authorized and empowered government board or agency establishes controls over wages and/or working conditions as a result of a national emergency, and only in the event such controls nullify, invalidate, alter or in any way render inoperative or illegal the wage increase effective January 1, 1951, as provided herein, or subsequent wage reopenings in accordance with" the parties' agreement, then "the restrictions . . . limiting the reopening rights of each of the parties to negotiate changes only in the straight time hourly rates of pay shall be declared inoperative and shall cease to be in effect during any period in which such board or agency exercises controls" and other types of pay rates might be negotiated.

Pursuant to the 1950 Act, the Wage Stabilization Board was established and wage controls were imposed on January 26, 1951. The Wage Stabilization Board's interpretation of its statutory function was: "Wage increases may be agreed upon but cannot be put into effect without Wage Stabilization Board approval except to the extent permitted by general regulations issued by the Board." (C. C. H. Emergency Labor Law Reports, par. 10,151.02.) On October 1, 1951, the union gave notice of its desire to negotiate changes relative to various mat-

ters, including premium pay for night, holiday and Sunday work. In January, 1952, an amending agreement—hereinafter called the "January 1 agreement"—was made whereby plaintiffs, the employers, were obligated to grant a cost-of-living adjustment; to pay an increase in base wage rates on January 1 of the years 1953, 1954, and 1955; and to make certain contributions to the union benefit fund. These benefits were subject to wage board approval. It was further provided that except as so amended and as to any changes that might result from an arbitration award (*infra*), the parties' original agreement and modification should remain in full force and effect until December 31, 1955, and there should be no reopening prior to January 1, 1956.

Concurrently with the "January 1 (1952) agreement," the parties executed a "Submission Agreement," providing for submitting to arbitration the question of what, if any, changes should be made in premium pay for night, holiday, and Sunday work. This agreement further specified: "If such award provides for any change in premium pay, such award shall be submitted for approval to the Wage Stabilization Board by joint petition of the parties hereto if then so required. The effective date of the Award shall be the date upon which it is approved by the Board, if such approval is necessary. If such approval is not required, the effective date shall be the date of said award. In no event, however, shall such Award be effective prior to April 1, 1952."

The arbitration award was made May 12, 1952, in favor of the pay increases. Pursuant to the "submission agreement," the parties submitted, by joint petition, the award to the Twelfth Regional Wage Stabilization Board. By decision of July 24, 1952, it approved the premium pay

only for Sunday work,, but not for night or holiday work. Thereafter the matter was automatically transferred to the National Wage Stabilization Board at Washington, D. C., for review. It was there pending when the President by executive order of February 6, 1953, terminated wage controls. That order provided, in part, as follows: "(1) All regullations and orders issued pursuant to the Defense Production Act of 1950, as amended, stabilizing wages, salaries, and other compensation, are hereby suspended; (2) The wage, salary, and other compensation adjustments proposed in petitions pending before wage and salary controll agencies may now be placed in effect without the approval of such agencies. To the extent that agreements involved in such petitions are conditioned upon approval under Title IV of the Defense Production Act, this order shall be deemed such approval, but such approval shall be subject to paragraph 3 hereof; (3) his order shalll not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability or offense possessed, incurred, or committed prior to this date."

Meanwhile (January 28, 1953) plaintiffs had brought this action alleging a controversy as to the meaning of the "submission agreement"; that defendants contend that premium pay for night and holiday work would become automatically effective immediately following the termination of wage controls, "regardless of whether or not the Wage Stabilization Board shall have approved or disallowed the award of such premium pay," while plaintiffs contend that "there shall never be any duty on the part of plaintiffs to pay any such premium pay for night work and holidays unless and until such premium pay is speci-

fically allowed and approved by the Wage Stabilization Board in accordance with the statutes of the United States governing wages, and that under the terms of the Submission Agreement, approval of such premium pay by the Wage Stabilization Board is a condition precedent to any liability and duty on the part of plaintiffs to pay such night and holiday premium pay." There was no dispute as to plaintiffs' obligation to pay the agreed increases for Sunday work, and these were immediately put into effect following approval by the decision of the Twelfth Regional Wage Stabilization Board in July, 1952. The cross-complaint filed on behalf of the union alleged the promulgation of the executive order of February 6, 1953, and sought a declaration that the effect of the order was to make the increases payable as of May 12, 1952, when the award was made, or alternatively, as of February 6, 1953, when the executive order was issued.

The trial court found as follows: "The provisions of the Submission Agreement with respect to approval of the award by the Wage Stabilization Board did not create or constitute a condition precedent to the finality of the award with respect to the said premium pay. Such provisions expressed the legal requirement of federal government approval, only; that such government approval was a continuing legal requirement until February 6, 1953; that with the termination of wage controls on that date, pursuant to . . . Executive Order . . . such legal requirement was eliminated." Accordingly, judgment was entered declaring defendants entitled to their premium pay for night and holiday work, with the effective date fixed as February 6, 1953.

In challenging this judgment, plaintiffs argue that wage board approval was a condition precedent to any obligation to pay the increased rates, and that the President's decontrol order would not suffice in the absence of such board approval. On the other hand, defendants maintain that wage board approval was not a condition precedent to the creation of a lawful contract, but that such approval was only required to make the performance of the contract lawful during the period of wage controls; that when wage board approval was no longer a legal necessity because of the decontrol order, the parties' contract on which the arbitration award rested became binding and the premium pay increases were then automatically in effect. In other words, defendants claim that wage board approval was at most only a condition precedent to the duty of performance, and that the President's decontrol order either dispensed with the need for wage board approval or in itself constituted approval.

The Defense Production Act and the specified wage board submission provided a procedure whereby the federal government, through the power of approval of collective bargaining contracts, controlled an aspect of inflation. Except in cases where the parties' agreement was designed as a subterfuge to evade wage control regulations (*infra*), the wage control procedure did not contemplate that the federal government should interfere in the parties' bargaining process. While wage controls existed, collective bargaining agreements providing for a wage increase needed wage board approval, whether such approval was mentioned in the agreement or not; but except as above noted, the agreement itself, even if not approved, was not unlawful. Rather only the making of payments under an unapproved agreement was unlawful. Thus, upon the

termination of wage controls, the necessity for wage board approval disappeared and there only remained the parties' lawful contract expressing the terms of their agreement. They had agreed to abide by the arbitration award and its authorized pay increases accordingly went into effect upon such termination.

Under their prior agreements and in the absence of the above-quoted provisions of section 8(b) of the "modification agreement" (September 22, 1950), the parties could not for five years have negotiated for anything but straight time hourly rates of pay. However, in view of section 8(b) and upon the establishment of wage controls, the prior restrictions in the parties' agreement upon their rights to reopen negotiations for other pay increases became inoperative. The suspension of these restrictions, pursuant to section 8(b), during the time of wage controls was only a definition of the period in which negotiations to reopen the subject of pay upon demands other than straight time hourly rates might be had; it in no way limited the nature of the agreement which the parties might make in their reopened negotiations.

By their "January 1 (1952) agreement" and their concurrently executed "submission agreement," the parties provided for certain premium pay increases subject to wage stabilization regulations. As appears from the above-quoted language of the "submission agreement," an award of premium pay increases was to be submitted to the wage board for approval if required. Plaintiffs cite the fact that said agreement makes no mention of such an award becoming effective upon the termination of wage controls though the wage board approval theretofore required had not been had. Accordingly, they maintain that the language of the "submission agreement"

reflects the intent of the parties that the specified wage board approval should be not only a condition precedent to liability to pay the increased rates, but also a method for testing the merits of the arbitration award.

However, it is the general rule in contract interpretation that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result. (12 Cal. Jur. 2d, §171, p. 389; Antonelle v. Lumber Co., 140 Cal. 309, 319.) Reasonably interpreted, the "submission agreement" indicates that the parties agreed to be bound by the terms of the arbitration award in final settlement of their disputed issues as to premium pay; and as so bound, defendants gave up the right to demand an annual reopening as to changes in the wage scale until January 1, 1956. The recital respecting wage board approval in the "submission agreement" was no more than recognition of a requirement under the law. Whether or not the parties incorporated such reference in their agreement was immaterial, for "governmental regulations cannot be varied or evaded by private contract," and the insertion of the controverted reference was "a useless gesture," adding nothing nor taking anything away "from the expressed and implied obligations of the parties" as set out in their agreement. (Atlantic Pacific Oil Co. v. Gas Development Co. [Mont.], 69 Pac. 2d 750, 758.) This is merely a restatement of the general rule that "all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were

expressly referred to and incorporated." (12 Cal. Jur. 2d, §135, p. 348.)

Plaintiffs unavailingly cite cases where the language of the agreement was clearly conditional in form, involving events as conditions which were wholly within the power of private parties to perform (*e. g.*, Van Norden v. Metson, 75 Cal. App. 2d 595; Dale v. Raines, 115 Cal. App. 2d 309), or requiring governmental approval in express provisional terms (*e. g.*, Hein v. Fox [Mont.], 254 Pac. 2d 1076). It is significant that there is no similar conditional wording here in the parties' "submission agreement." If the parties had intended that in the event the arbitration award was made at a time when wage board approval was required and that such approval should be a condition precedent to effectiveness, they could have expressly specified that *only* if so approved, would the award become effective; but not having used the word *only*, they reasonably could be assumed to have intended, as the trial court concluded, that the award would become effective if given such approval *or* on such approval becoming unnecessary.

The requirement of government approval for performance of a contract does not invalidate a lawful contract. (Nussenbaum v. Chambers & Chambers [Mass.], 77 N. E. 2d 780, 782-783.) During the period of wage controls, the function of the wage board was not to determine the merits of awarded pay increases pursuant to agreements reached between the contracting parties, but only to determine whether such increases would be inflationary in their effect upon the nation's economy. Contrary to the argument of *amici curiae* for plaintiffs, the establishment of wage controls did not indicate that wage board approval was intended to operate as a yard-

stick in relation to the merit of negotiated pay increases; that until such approval was obtained, there was no effective contract between the parties; and unless approval was had before the termination of wage controls, there was nothing left of the parties' contract. Here the payment of the awarded increases would not be in violation of the law as wage controls had been terminated. Plaintiffs do not claim that the parties intended that any awarded increases which might take effect, either by reason of wage board approval or the termination of the requirement for such approval, should constitute, in reality, retroactive, increased payments for work previously performed. Therefore the cases cited by plaintiffs—De La Rama S. S. Co. v. Pierson, 174 Fed. 2d 84, and *In re* Pringle Engineering & Mfg. Co., 164 Fed. 2d 299—condemning intentional efforts to circumvent the wage control law by subterfuge, have no bearing on the question presented here.

The trial court properly concluded that the wage control procedure did not contemplate that the Government should interfere in the parties' bargaining process; that while controls were in effect and a curb on inflation was needed, pay increases had to be approved so as to make the payments lawful but when wage controls were terminated and wage board approval was no longer required, then the parties' agreement to abide by the arbitration award was in effect and the required performance, without wage board approval, was effective; that the award should not be given retroactive effect, for from the time it was made on May 12, 1952, and until the decontrol order of February 6, 1953, wage board approval was a continuing requirement, but on the latter date, when controls were terminated, the increase in pay benefits could

lawfully go into effect without wage board approval and therefore the operative date of the award was February 6, 1953.

The further point made by defendants that the decontrol order operated by its terms as an actual "approval" of the arbitration award need not be considered here in view of our conclusions that the decontrol order rendered unnecessary the requirement of approval, and that the arbitration award became effective as soon as wage controls were terminated.

Plaintiffs raise two procedural points that should be mentioned. They first question the propriety of including Food Employers Council as a cross-defendant in this action, claiming that while it is composed of some one hundred retail food markets, it employed no persons represented by defendants; it did not come within the coverage of the parties' collective bargaining negotiations; and it therefore was not concerned with the interpretation of the parties' agreements. But the record shows that Food Employers Council was a party to the "submission agreement." Having made the contract in its own name, though as agent of plaintiffs, it could have maintained an action on it. (Earl Fruit Co. v. Herman, 90 Cal. App. 640, 644-645.) In such circumstances, it certainly was properly joined as a cross-defendant in an action seeking a declaration of the rights of the parties to the contract.

Nor is there merit to plaintiffs' second point, that Joseph T. DeSilva was not a proper party to file the cross-complaint herein. DeSilva was an officer and member of the union, an unincorporated association. The union entered into the contract for the benefit of its members and should have the right to litigate issues connected

therewith. However, since an unincorporated association cannot sue, a representative or class suit may be brought on its behalf by one of its officers. (Rosicrucian Fellowship v. Rosicrucian etc. Church, 39 Cal. 2d 121, 139-140.) Moreover, plaintiffs made DeSilva a party defendant, indicating their belief that he had an interest in the litigation; and in the course of the trial, the parties stipulated that if the trial court should conclude that the union rather than DeSilva was the proper cross-complainant, amendment to that effect would be proper and all proceedings on DeSilva's cross-complaint would be deemed to have been had on behalf of the union.

The judgment is affirmed.

SPENCE, *J.*

We concur:

GIBSON, *C. J.*
SHENK, *J.*
EDMONDS, *J.*
CARTER, *J.*
TRAYNOR, *J.*
SCHAUER, *J.*

(45 A. C. 790; and 29.. P. 2d .....)

In the Supreme Court of the State of California

ALPHA BETA FOOD MARKETS, INC., a corporation, *et al.*,
Plaintiffs, Cross-Defendants and Appellants,

RETAIL CLERKS UNION LOCAL 770, an unincorporated voluntary association, *et al.*,
Defendants and Respondents,

and

JOSEPH T. DeSILVA, individually and in a representative capacity, for and on behalf of RETAIL CLERKS UNION LOCAL NO. 770, an unincorporated association, its officers and members,
Defendant, Cross-Complainant and Respondent,

and

FOOD EMPLOYERS COUNCIL, INC.,
Cross-Defendant and Appellant.

PETITION FOR REHEARING.

To the Honorable Phil S. Gibson, Chief Justice of the Supreme Court, and to the Honorable Justices of the Supreme Court:

Appellants respectfully petition this Honorable Court for a rehearing of this case after decision by this Court filed on December 16, 1955, upon the following principal grounds:

1. The decision misinterprets the Defense Production Act of 1950 in determining that the agreement was legal under the Federal law and was therefore valid and enforceable.

The Court in its decision has announced a principle which could destroy the effectiveness of any future wage stabilization program. In addition to erroneously finding the existence of an agreement which the parties could not reasonably have agreed to under the circumstances, it has held legal an agreement made during the period of controls to pay increases in excess of those permitted by controls after those controls were removed. In doing so it has sanctioned a most effective device for circumventing wage controls.

The opinion completely frustrates the policy and purpose declared by the Congress. It allows parties by their private agreements to circumment the national policy in establishing controls over wages and prices. Not only has this Court decided this question erroneously, its opinion does not give adequate consideration to the serious issue involved—the enforcement of wage stabilization policy during any period of national emergency. The Court has neglected even to discuss or distinguish the authorities cited by the Appellants in support of its arguments.

2. The Court's opinion reflects several basic misconceptions of the Appellants' position which has resulted in an erroneous determination of the case.

The Court's construction of the various agreements between these parties as imposing an obligation to pay the disputed increases after the termination of controls is in error and a grave injustice to the Appellants. The Court's opinion indicates that the Court misinterpreted the Appellants' position that there never was an agreement to pay increases in excess of those permissible by wage regulations at any time whether before or after the termination of controls.

I.

The Court Misinterpreted the Defense Production Act of 1950 in Holding to Be Legal an Agreement Made During the Period of Controls, to Pay, After the Abolition of Controls, an Increase in Wages in Excess of That Permitted by the Wage Stabilization Board to Be Legal.

The construction which this Court has placed upon the various agreements of the parties establishes an obligation to pay the disputed increases upon the abolition of wage controls. The Court, of course, found no new agreement executed *after* the abolition of controls to pay these increases. Thus, his Court determines that an agreement *made during the period of wage controls* to pay wages in excess of those permitted by wage controls, upon the abolition of controls for services to be rendered after the abolition of controls. The Court's holding that such an agreement is legal under the Federal law is in error and is based upon misinterpretations of the Defense Production Act of 1950, the controlling law.

FIRST: *The Defense Production Act of 1950 does not merely prohibit payments in excess of wage controls, it also prohibits agreements to pay in excess of wage controls.*

The opinion of this Court is in error in interpreting the Defense Production Act of 1950 to apply only to "payments" in excess of the amounts allowed by wage controls.* This holding is completely in conflict with the

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*This Court in its opinion, said: "but except as above noted, the agreement itself, even if not approved, was not unlawful. Rather only the making of payments under an unapproved agreement was unlawful."

purposes of the Defense Production Act in attempting to limit and control inflation. The decision in this regard is directly contrary to the decisions of other courts, which decisions received no discussion by this Court.

The Defense Production Act of 1950 states:

> "No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title . . ."
>
> 64 Stat. 807, 50 U. S. C. A., App. 2105.

> "Any person who wilfully violates any provision of section 405 of this title [section 2105 of this Appendix] shall be guilty of a misdemeanor and shall upon conviction thereof, be subject to a fine of not more than $10,000, or to imprisonment for not more than one year, or both."
>
> 64 Stat. 811, 50 U. S. C. A., App. 2109.

The purpose of wage stabilization would be completely nullified if the Act were interpreted to apply only to the actual *payment* of increases and not to *agreements* to pay increases. In reviewing the identical wording of the World War II Act, the Court of Appeals for the Ninth Circuit said:

> "As for the contention that the letter of the quoted language of the Act merely prohibits payment, and does not prohibit promises of payment, we would not hesitate to hold that in view of the declared purposes of the Stabilization Act, such an attempt, without approval of the Stabilization Unit, to provide additional inducements to employees *by way of promises of future payments, was prohibited by the Act.*" (Emphasis added.)
>
> *De La Rama S. S. Co. v. Pierson,* 174 F. 2d 84, 87.

Regarding this very Act, the Texas court stated:

> ". . . the Act (prohibits) not only payments of compensation unless in conformity thereto, but *agreements* for compensation. Although made in good faith, we see no difference in principle between an agreement for compensation made during Federal control but relating to employment commencing prior thereto, and one similarly made but payable after suspension of controls; for in either case the control Act would be rendered easy of circumvention." (Emphasis by the Court.)
>
> *Mitchell v. Texas Housing Co.*, 265 S. W. 2d 157, 161.

The construction suggested by this Court would permit the most patent evasions of wage controls. It flies in the teeth of the stated purpose o the Act:

> ". . . To prevent inflation . . .; to protect the national economy against future loss of needed purchasing power by the present dissipation of individual savings; and to prevent a future collapse of values."
>
> 64 Stat. 803, 50 U. S. C. A., App. 2101.

The Court's interpretation is unrealistic and unsound. It would limit the effect of Federal Wage stabilization policy presumably to cash payments, totally failing to recognize that a note or a simple agreement to pay is merely a form of deferred payment.

The Court in reaching this conclusion has disregarded the specific holdings in *De La Rama S. S. Co. v. Pierson* (9th Cir., 1949), 174 F. 2d 84, 87-88, and *Mitchell v. Texas Housing Co.* (Tex. Civ. App. 1954), 265 S. W. 2d 157, 163-164. The *De La Rama* case arose in California and interpreted the identical language in the Fed-

eral stabilization law of World War II. It is important to note that the decision in the *De La Rama* case was published in 1949 prior to Congress' enactment of the Defense Production Act of 1950, and that Congress used the very same language in the 1950 Act that it had used in the World War II Act. That language had unequivocally been declared by the Court of Appeals for the Ninth Circuit to apply to promises to pay as well as to payments. The Texas Housing and De La Rama holdings on this point, at the very least, should merit comment by this Court.

SECOND: *The Defense Production Act of 1950 is not restrictive in its application to agreements for payment for services rendered during the period of controls. To effectuate its purposes, this Act must be applied to all agreements for compensation made during the period of controls, whether the services were to be performed during controls or after controls.*

The decision of this Court errs in stating that the Defense Production Act does not apply to payment of wages in excess of that permitted by controls even though for work performed after the termination of stabilization under an agreement for such payment made during the period of controls. This decision violates the prime purpose of the Act which is to prevent inflation. It provides an open invitation to private parties to circumvent and scuttle any future stabilization program of the Federal Government.

That the implementation of this decision would result in an emasculation of wage policy is best illustrated by an example, the case of Employer and Employee during some future stabilization period. Employee's wages are

controlled at $100.00 a week. Employee tells Employer that he wants $200.00 a week. Employer knows he cannot pay such an amount without approval of the stabilization authorities and knows that such approval is highly unlikely, but Employer wants to keep Employee from leaving his employment. Employer, therefore, during the period of controls agrees to pay Employee $200.00 a week "subject to wage board approval" if necessary at the time of the agreement, with the proviso that if approval is not obtained Employee will receive his $100.00 a week wage until the termination of controls and then for an equal length of time after controls have been terminated shall receive a wage of $300.00 a week. As in the instant case the parties contract for wage approval if necessary when the agreement was made—and such approval is conceded to be then necessary. *The decision of this Court specifically authorizes and places the stamp of legality upon such an agreement.* Employee is satisfied. His wages average $200.00 a week. Employer presumably is satisfied because he is able to keep Employee in his employ. Yet it is hardly conceivable that any party would deny that such an arrangement completely thwarts an effective wage stabilization program. And yet this Court's decision based on an unrealistic premise authorizes such an evasion of controls. The importance which Respondents' attach to this case demonstrates the serious and far-reaching implications of this decision.

The all-encompassing nature of the wage stabilization policy as declared by the Congress in the Defense Production Act of 1950 is emphasized in the cases which have almost unanimously ruled against the enforcement of private agreements which would seek to defeat or impinge on the national policy. This Court has failed to recognize

the application of such authorities. The Court has failed even to discuss the import of these cases as they reflect the overall policy of wage stabilization, except to summarily dismiss two of these cases on the erroneous assumption that the subject agreements were "intentional efforts to circumvent the wage control law by subterfuge."

The cases holding agreements made during the period of controls illegal because in contravention of wage stabilization can conveniently be categorized under three general headings:

(1) Agreements to pay during the period of controls for work performed during that period, see *Sidney v. Martin Iron Works* (1951), 105 Cal. App. 2d 295; *Morford v. Bellanca Aircraft Corp.* (Del. Super. Ct., 1949), 67 A. 2d 542;

(2) Agreements to pay after the period of controls for work performed during the period of controls, see *In re Pringle Engineering & Mfg. Co.* (7th Cir., 1947), 164 F. 2d 299; *De La Rama S. S. Co. v. Pierson* (9th Cir. 1948), 174 F. 2d 84; *Mitchell v. Texas Housing Co.* (Tex. Civ. App. 1954), 265 S. W. 2d 157; contra, *Nussenbaum v. Chambers & Chambers* (Mass. 1948), 77 N. E. 2d 780 (rejected in the *De La Rama* case); and

(3) Agreements to pay after the period of controls for work to be performed after controls, see *Joseph Denunzio Fruit Co. v. Crane* (S. D. Cal. 1948), 79 F. Supp. 117, aff'd (9th Cir., 1951), 188 F. 2d 569, 570. (Price control case declaring illegal an agreement made during the period of controls to buy and sell at a price above the control price; the performance to take place entirely after the item involved was decontrolled.)

The instant case involves this third type of agreement. Each of these agreements is illegal and therefore void and unenforceable no less than the other if the amount of compensation agreed to is in excess of that which is permissible during the period of controls. For the wage stabilization policy could easily be circumvented if it were possible to legally agree during the period of controls for increased payments after the period of controls for work to be performed thereafter. There is no distinction between this case and the cases involving work performed during the period of controls:

(1) The agreement to pay in the future for work to be performed in the future has a present value. It is worth something to the employee who is the promisee of such a promise to the same extent that the agreement in the *Denunzio* case had a present value to the contracting parties. Thus, such an agreement is not to be distinguished in legal effect from the payment of a wage during the period of controls in excess of that allowed by controls, or the payment after controls for work performed during the period of controls. The value arises at the time the obligation is created. Such a danger is pointed out by the Court of Appeals for the Ninth Circuit:

> "if the Steamship company could by this agreement bind itself, any employer could as easily avoid regulations designed to 'hold the line' on salary levels by simply issuing to its employees notes payable after controls should be lifted."
>
> *De La Rama S.S. Co., v. Pierson,* 174 F. 2d 84, 87.

(2) The policy controlling stabilization would be severally affected if such agreements for payment

for work to be performed after controls, where such future payments were in excess of those permissible during the period of controls, were not illegal. The many individual employees whose wages are subject to stabilization would natually be inclined to anticipate the end of controls and the promised increase in wages that they would then receive by spending more of their earnings during the period of controls. In this era of easy customer credit and purchases financed long into the future, the assurance of later increases to cover later monthly payments would encourage and stimulate the extension of credit purchases and at the same time encourage the demand for goods, the very inflationary results which Congress sought to avoid, *i. e.,*

> ". . . To prevent inflation and preserve the value of the national currency; . . . to assist in maintaining a reasonable balance between purchasing power and the supply of consumer goods and services; to protect the national economy against future loss of needed purchasing power by the present dissipation of individual savings; and to prevent a future collapse of values. . . ." 64 Stat. 803, 50 U. S. C. A., App. 2101.

(3) The existence and spread of this type of agreement as a legal device providing for increases to take effect after the abolition of controls, might have a serious effect upon the termination of controls itself. It certainly would be readily conceded that such controls are temporary expedients and are directly in contravention of the basic freedom of the citizens of this country to contract. When the emergency ceases these controls should likewise quickly

cease. However, if the abolition of controls would result in a rash of increases pursuant to the type of agreement this Court has legalized, the policy of controls would again be defeated. Instead of controls being ended because inflation was ended, the mere act of termination would give a spurt to inflation since the promises to pay would all then become effective. Upon the basis of the Respondents' own evaluation of the importance of this case, the foregoing is not idle speculation.

THIRD: *The Court failed to consider and apply the sound rationale of the controlling decisions.*

We urge that a just disposition of this case requires careful study and full evaluation of the authority of these cases, particularly in view of the paucity of authority upon which Respondents' position and the decision of this Court rest.

The Court's characterization of the *Pringle* case (164 F. 2d 299) as a situation where the parties sought to circumvent the wage control law by subterfuge is completely erroneous. In the *Pringle* case the parties agreed to submit the proposed bonus arrangement to the stabilization authorities and did in fact submit it. The stabilization authorities deferred action until it was time to make payments under the compensation arrangement. Thus, there was no attempt to evade regulations. In fact, every attempt was made to abide by regulations. Irrespective of the failure of Respondents to meet this case and their obviously incorrect statement of its facts, it stands directly contrary to the opinion of this Court.

The *De La Rama* case (174 F. 2d 84) did involve a situation where the parties were apparently seeking to

avoid wage regulations, but this factor was not relied upon by the Court in reaching its decision.

Moreover, this Court is in error in stating that only those agreements which represent "intentional efforts to circumvent wage controls by subterfuge" are illegal. Whether or not the parties intended to evade or circumvent wage controls is immaterial to a determination of the legality of their agreement. The Court completely disregards the fact that agreements which are opposed to wage stabilization policy, whether malevolently or innocently conceived, have the same deleterious effect on that policy. It is an indisputable proposition of law that the subjective intentions of the parties to an agreement are irrelevant in determining the legality of the agreement.

> "In order to render a contract in violation of law illegal, it is not necessary that there shall exist any corrupt intention on the part of the contracting parties."
>
> 17 C. J. S., Contracts, Sec. 190.

The language of Justice Holmes in the case of *Bullen v. Wisconsin,* 240 U. S. 625 (36 S. Ct. 473), is particularly appropriate where he says at page 474:

> "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himsef to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

II.

The Court's Opinion Reflects Several Basic Misconceptions of Appellants' Position.

First, the Court states that:

> ". . . the function of the wage board was not to determine the merits of awarded pay increases pursuant to agreements reached between the contracting parties, but only to determine whether such increases would be inflationary in the effect upon the nation's economy."

and again that:

> ". . . the wage control procedure did not contemplate that the Federal Government should interfere in the parties' bargaining process."

Both of these statements and others in the opinion, indicate a basic misconception of Appellants' position. We have not contended that Wage Board or any agency should interfere in the parties' bargaining process, or that the function of the Wage Board was to determine the merits of awarded pay increases agreed to in collective bargaining. Our position has merely been that the parties never agreed during the period of controls to pay increases in excess of the ceiling established by wage regulations either before or after the abolition of wage controls. Section 8(b) of the Modification Agreement, and the 1952 agreements entered into within the framework of that section, support this position.

Second, the Court erroneously states that we maintain that:

> ". . . the language of the 'submission agreement' reflects the intent of the parties that the specified wage board approval should be . . . a method for testing the merits of the arbitration award."

Appellants have accepted the arbitration award as being the equivalent of the agreement of the parties to the same extent that the Agreement of January 1, 1952 was such an agreement. Contrary to Respondents' oft repeated assertions, we have never contended that the award of the arbitration board was to be reviewed on its merits by the Wage Board. Our position has been that the parties, by their agreements, limited any increases to those which were permissible under Wage Board regulations.

Third, the Court's opinion conveys the impression that to decide this case for the Appellants would result in a forfeiture. The record, however, discloses no element of forfeiture in this case. The only "forfeiture" the Union stands to suffer is that it may not get something it has no right to receive.

It was only because of the imposition of controls that Section 8(b) permitted the parties to bargain on other than straight time hourly rates of pay. The Union thereby benefited in that it could open the agreement for negotiation on items other than straight time hourly rates. The Union, however, wants to gain by the imposition of controls and gain again by the expiration of controls.

The Court cites the fact that the Union gave up the right to demand an annual reopening as to changes in the wage scale until the contract termination December 31, 1955, evidently assuming that this phase of the agreement was a *quid pro quo* for the premium pay items in dispute. A realistic appraisal of the bargaining relationship demonstrates that this is not so. The Union obtained in addition to other benefits, an annual "improvement factor" increase to take effect on January 1st of each succeeding year, plus a periodical cost of living adjust-

ment. These are the equivalent annual benefits that the Union gains by giving up the right to reopen. These two items are directly related to the annual reopening. The premium pay issue is not so directly related. Moreover, the Appellants likewise gave up their right to reopen.

It is obvious that neither the Union nor the employers could foretell with any degree of certainty what was to be the outcome of the premium pay dispute. The Union took the risk that, first, the Board of Arbitration would deny some or all of its proposed increases, and second, it took the risk that the Wage Stabilization Board would turn down whatever, if any, increases the Board of Arbitration recommended, and third, it took the risk, which materialized, that wage controls would be abolished before the Wage Stabilization Board had had an opportunity to act. Not only is there no forfeiture of any right of the Union, but the facts point to the Union as the party which seeks to capitalize upon an apparently equitable hit in fact an inequitable position.

Fourth, the Court's characterizations of the statement regarding approval of the Wage Stabilization Board in the submission agreement as immaterial is erroneous. All agreements for compensation during a period of wage controls require Wage Board approval, even though nothing is stated in the agreements concerning Wage Board approval. Therefore, as a matter of simple contract construction, since the parties here have made this recital, they must have intended it to mean something. They did not merely accomplish a useless act. The only object which the parties in this case could have intended the reference to approval to mean is that there was no obligation to pay these increases unless and until the Wage

Stabilization Board applied its standards to grant such approval. Such approval was specifically required if necessary when the award came down. And it was then so necessary. The Court's opinion makes these words a nullity.

For the foregoing reasons we urge this Court to grant a rehearing of this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955

No. 685

ALPHA BETA FOOD MARKETS, INC., a corporation, ET AL.,
Petitioners,

v.

RETAIL CLERKS UNION LOCAL No. 770, an unincorporated voluntary association, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of California is reported in 45 Adv. Cal. 790, 291 P. 2d 433.[1]

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[1] Petitioners have frequently referred to and have appended the opinion of the District Court of Appeal—an intermediate appellate court in California. (Pet. p. 39) Under California practice once a case has been transferred to the Supreme Court, the decision of the District Court of Appeal is vacated and no longer has any effect in that case or as a precedent. (*Estate of Kent*, 6 Cal. 2d 154, 156, 57 P. 2d 901, 902).

JURISDICTION

Jurisdiction is invoked here under section 1257 (3) of Title 28, U. S. Code.

QUESTION PRESENTED

During the existence of price and wage controls under the Defense Production Act of 1950, a collective bargaining agreement was executed providing for arbitration of the question what, if any, changes should be made in the then existing premium pay schedule for petitioners' employees. The submission agreement expressly provided that any change of pay awarded would be submitted to the Wage Stabilization Board for approval; and that the effective date of the award should be the date of approval, if approval were necessary, and the date of the award if approval was not required. An award providing for an increase of premium pay was rendered. While a petition for approval was pending wage controls were suspended by Executive Order.

In these circumstances, petitioners (who were the plaintiffs in the trial court) originally sought to have the following question determined: Were petitioners obligated, as respondents contended, to pay the awarded increase from and after the date of suspension of wage controls for work performed after that date, or was Wage Stabilization Board approval an inflexible condition precedent to any such obligation, as petitioners insisted? The Supreme Court of California answered that question in accordance with respondents' contention, treating the question, as did petitioners in presenting it to the state court, as one of contractual intent and interpretation—obviously a

question of state law (*Commercial Publishing Co.* v. *Beckwith,* 188 U.S. 567, 571).

Subsequently, petitioners presented the following additional question:

Was the contract providing for the premium pay increase void as violative of the Defense Production Act of 1950, because the increase had not been approved, even though no increase was paid or agreed to be paid without approval for any work done while controls were in effect?

The Supreme Court of California answered the latter question in the negative. It is, of course, only this question which raises any possible ground of federal review.[2]

ARGUMENT

I. The petition on its face discloses that there is no reason for the granting of a writ of certiorari

The Supreme Court of California held that under California law the arbitration agreement involved in this case was enforceable. In reaching that decision the state court held that the fact that the arbitration agreement was entered into during a period of wage control did not make the payment of the awarded increases illegal as to work performed after controls had terminated.

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[2] There were other questions raised below which the Supreme Court of California found it unnecessary to decide. For example, respondents contended that the award had been approved within the meaning of the contract by the express provisions of Executive Order No. 10434 (3 C.F.R. 1953 Supp. 65, 18 Fed. Reg. 809, 50 U.S.C.A. App. (1954 Supp.), p. 118, following Sec. 2101).

There is no conflict between this decision and any other either in the state or federal courts. The wage stabilization program ceased operation on February 6, 1953, more than three years ago. Petitioners' sole point is that the Supreme Court of California erred in interpreting the effect of the wage control program. They do not show, however, any reason why questions with respect to the application of regulations which are no longer in effect, and as to which there is no conflict in interpretation, should be reviewed on certiorari by this Court. The interpretation of wage control regulations is of no possible importance today. There are no cases pending which are similar to the case at bar. In view of the length of time since the termination of wage controls it is impossible that new cases can arise. A decision on the merits in this case will affect the rights of no one but the immediate parties. It will not be in any way useful as a precedent or a guide in other cases.

Unable to offer any reason why review of this case would have any present importance, petitioners argue instead that the Court should undertake to construe these obsolete wage regulations "so as to avoid *future confusion and to promote an efficient administration of controls*" [in the future] (Pet. p. 19, emphasis supplied).

It is unlikely, however, that if wage controls are ever again necessary the regulations imposed would be identical with those of the past. Petitioners are therefore inviting this Court to make a decision which will in some way limit or affect some future program of wage control which will necessarily be inaugurated under conditions which today this Court can only speculate about. Under the principles governing the grant

of certiorari this would seem to be a plain case for summary denial of the petition.

II. Certiorari should be denied because the decision below is correct on the merits

The Defense Production Act of 1950 did not prohibit the making of a *contract or agreement* for increased wages. It prohibited only the *payment* or *receipt* of such wages in contravention of any control order or regulation promulgated by the President. [50 U.S.C.A. App., Sec. 2105(b)]

In the nature of things the Act had to be so drawn. Wages—at least in those industries where collective bargaining is now the rule—are no longer imposed by fiat of the employer. Accordingly, the Congress realized that before any proposed wage could be presented to a Wage Stabilization Board for approval there had to be an agreement on amount between employer and employee. As a consequence, it was not the act of contracting, but unapproved performance, i.e., payment and receipt of excess wages without approval, which was prohibited.[3]

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[3] The Act and the regulations under it furnish strong internal evidence supportive of this analysis. *First*: In its analogous restraints on *commodity prices*, the Congress did not stop with a prohibition of the payment or receipt of a price in excess of ceilings. It also prohibited the making of any *agreement* for such a price. [50 U.S.C.A. App., sec. 2105(a)] The narrower range of the wage control provisions was plainly deliberate and meaningful. *Second*: Specific provisions of the regulations contemplated that agreements could be lawfully entered into, but that performance was dependent on approval. An official interpretation of Regulation 1 was precisely to that effect [WSB, *Questions and Answers*, Feb. 15, 1951]; General Wage Regulation 13 [16 Fed. Reg. 7328] provided that the Board would act on petitions for approval of premium pay not exceeding prevailing industry or area practices; General Wage Procedural Regulations,

The contract here involved was not, therefore, violative of the Act. The increase provided for was not paid or agreed to be paid during the period of control unless approval was obtained; nor was there any agreement to pay an unapproved increase *at any time* for work done during that period. As interpreted by the state court, the contract called only for payment of approved increases during the control period, and for payment thereafter only for work subsequently done. Thus, there was not and could not be any payment or receipt of wages contrary to any regulation or order under the Act. The state court correctly held that no illegality and consequently no invalidity could be attached to such a contract.

The decisions upon which petitioners rely for a contrary conclusion (Pet. p. 18, note 10) do not support their position. In each of them the contract which was held invalid was a palpable evas on of the Act, because it provided for pay, after controls had ended, on account of services rendered *during the control period.*

Joseph Denunzio Fruit Co. v. *Crane,* (S. D. Cal., 1948) 79 F. Supp. 117, affirmed, 9 Cir., 188 F. 2d 569 (Pet. p. 19) has no application to the question here raised. That was a *commodity price* case, where, as

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sec. 4.4(a)(2) [16 Fed Reg. 10,018] required that copies of the collective bargaining agreement or arbitration award providing for the increase sought to be approved be attached to the petition for approval. *Third:* The Act clearly recognized that collective bargaining would continue and that agreements relating to wages would be entered into. [50 U.S.C. App. secs. 2101, 2102(a), 2102(d)(2)] *Fourth:* The President similarly interpreted the Act in directing that it be so administered as to preserve collective bargaining. [Exec. Order No. 10161, 15 Fed. Reg. 6105].

we have seen, the Act clearly prohibited *agreements* as well as payment or receipt. Furthermore, the comment relied upon by petitioners was *dictum,* the actual decision in the case being that the contract was a lawful one since it called for no payments in excess of ceilings.

The contract at bar, far from being an evasion, expressly evidenced an intention to comply with the law, by its requirement for approval if approval was necessary. In the state court's interpretation of the contract (which is binding here). (See, *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.,* 332 U.S. 495, 499-500; *United States* v. *Burnison,* 339 U.S. 87, 89; *Forsyth* v. *Hammond,* 166 U.S. 506, 518) there could *never* be, and there has not been in fact, any payment of the awarded increase in respect of work done before approval had been obtained or controls had been ended. In other words, the contract, according to the intention of the parties, called for payment of only such increases as, at the time of payment, could be lawfully paid. It was, therefore, a valid agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

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